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Supreme Court, U.S.
FILED

No. 98 1810 MAY 10 1999

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998

SHERRY L. McGINNIS, *Petitioner*
v.
ANCHORAGE SCHOOL DISTRICT, *Respondent*

SHERRY L. McGINNIS, *Petitioner*
v.
ANCHORAGE EDUCATION ASSOCIATION, *Respondent*

SHERRY L. McGINNIS, *Petitioner*
v.
JOHN PATTERSON, *Respondent*

SHERRY L. McGINNIS, *Petitioner*
v.
CHANCEY CROFT, *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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91PP

Adjudicated on summary judgments, affirmed without remark except "for the reasons stated by the district court," were this teacher's Complaint causes of action for wrongful termination of tenured public employment, discrimination based on medical condition, and Alaska statutory and common law claims. Five questions of national importance are raised by the Ninth Circuit's courts' summary dispositions:

1. Is Fourteenth Amendment due process denied public school teachers by Alaska statute wherein the only provision for a hearing regarding a termination of tenure is a 15 day request period to seek a hearing, commencing after the teacher has been given his/her notice of termination?

2. Does the Ninth Circuit's criterion of review of summary judgment motions apply the precedent of Celotex Corp. v. Catrett, in a manner that improperly shifts the burden of proof to non-moving parties on causes of action that are based upon the moving party's failures to act (e.g. a wrongful termination due to a non-reinstatement)?

3. When *de novo* is the mandatory standard of review on appeals from summary judgments, does a court of appeals deny meaningful, *de novo*, review of the errors briefed on appeal by ordering the appeal submitted on the briefs and by rendering a one sentence decision announcing the court affirms the summary judgments solely "for the reasons stated by the district court in its orders"?

4. Are the Ninth Circuit's courts utilizing appropriate criteria to evaluate the merit of appeals based on state law precedent, and prior to levying sanctions under Federal Rules of Appellate Procedure, Rule 38?

5. Is additional guidance or renewed Supreme Court instruction warranted on what due process is required before a public school teacher's tenure may be taken, since courts in the Ninth Circuit have not followed precedent mandating a pretermination hearing?

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IN THE SUPREME COURT OF THE UNITED STATES
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SHERRY L. McGINNIS, *Petitioner*
v.
ANCHORAGE SCHOOL DISTRICT
ANCHORAGE EDUCATION ASSOCIATION
JOHN PATTERSON, and
CHANCEY CROFT, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Sherry L. McGinnis ("teacher") petitions for a writ of certiorari to review the decision in this case of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' decision, denial of rehearing, and order of sanctions were unreported (Apps. A-D, *infra*, 1a-13a). The summary judgments of the district court and order denying rehearing were unreported (App. E, *infra*, 14a-57a). The underlying Alaska state court decision ordering the employer to "immediately" reinstate teacher was unreported (App. G, *infra*, 60a-61a).

JURISDICTION

On December 21, 1998, the decision of the court of appeals was entered (App. A, *infra*, 1a-3a). On February 12, 1999, the court of appeals entered its decision denying teacher's timely filed

motion for rehearing (App. B, *infra*, 4a-6a). Jurisdiction of this court is invoked pursuant to 28 U. S. C. §1254(1).

The constitutionality of Alaska statute AS 14.20.180 is in question: Therefore, 28 U. S. C. §2403(b) may apply and service of process of this petition upon the Attorney General of the State of Alaska is made as shown on the proof of service filed herewith. The courts below did not certify to the Alaska Attorney General that the constitutionality of AS 14.20.180 was in question.

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV
(App. F, *infra*, 58a)
Alaska Statute, AS 14.20.180
(App. F, *infra*, 58a-59a)
Federal Rules of Appellate Procedure, Rule 38
(App. F, *infra*, 59a)

STATEMENT OF THE CASE

Teacher recovered $100,000 toward medical care for an on-the-job injury and was granted judgment in state court that ordered "immediate" reinstatement after finding that the Anchorage School District's prior act of terminating this teacher, while she was incapacitated by her injuries, was without merit (App. G, *infra*, 60a-61a). To reinstate tenure, Alaska statutes and precedents require school districts to tender to the teacher a written teaching contract, textbooks, and back pay. The school district concedes that when teacher left the job-site, 71 days after the state court ordered action, the district had not tendered anything to her. The school district further concedes that its only subsequent act was to mail a dismissal letter to teacher that stated the district had terminated her again. The letter stated, "[y]ou may request a hearing... concerning your termination, if within 15 days... you

submit a written request" (App. H, *infra*, 63a). Teacher again sued the Anchorage School District, this time in U.S. District Court, along with the Anchorage teachers' union and two Anchorage attorneys. Teacher's Complaint alleged that: (a) her tenure was not reinstated; (b) the district's (re-)termination was without due process; (c) the district had converted $2,700 of back pay already earned, and; (d) money damages were due pursuant to negligence and other Alaska statutory and common law claims.

The four defendants moved for, and were granted, separate summary judgments. Twenty-eight specific legal errors committed by the district court were briefed on appeal, and upon teacher's motion, were consolidated for review before one panel at the Ninth Circuit Court of Appeals. *Sua sponte* the panel ordered the appeal submitted on the briefs and thirteen days later the panel affirmed without remark except for "the reasons stated by the district court in its orders" (App. A, *infra*, 3a).

The district court identified jurisdiction on its docket sheet as "federal question - U.S. not a party" and as 28 U. S. C. §1332 diversity of citizenship. When the suit was filed all defendants were domiciled in Alaska, teacher was domiciled in California, and the actual amount in controversy exceeded $50,000.

REASONS FOR GRANTING THE PETITION

I. Alaska's tenured teachers are stripped of the "root requirement" of due process prior to termination of their public employment under Alaska statute and under the Ninth Circuit's interpretation of "when" the dismissal becomes effective.

In 1985, this Court settled the question of "what" minimum due process was required by the Fourteenth Amendment whenever a property interest existed in continued public employment. *See*, Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Loudermill held that the "essential requirement of due process" included notice and an opportunity to respond prior to action by the public employer to terminate employment. Id. at 546. But, writing in dissent, Chief Justice Rehnquist characterized the Court's balancing inquiry in the Loudermill line of cases as "subjective," "unpredictable," and "without principled standards" such that "[e]very different set of facts will present a new issue of what process was due and when." Id. at 562-563 (Rehnquist, C.J., dissenting).

The question here is "when" is the process due, in light of a state statute that expressly creates a right to a hearing during a 15 day request period that commences after notice of dismissal has been given to the teacher.

Alaska's statute, AS 14.20.180(b), provides that a tenured teacher has 15 days after he/she receives notice of dismissal to request a hearing before the school board (App. F, *infra*, 58a-59a). The interpretation given by the lower courts was that "Alaska law..., provided [teacher] with the pre-termination right to a hearing, because 'termination is not effective until at least fifteen days following the notification of dismissal'" (App. D, *infra*, 12a, *quoting*, Kenai Peninsula Borough Bd. Of Educ. v. Brown, 691 P.2d 1034, 1037 (Alaska 1984); *and compare*, App. E, *infra*, 30a).

This Court previously stated that:

"Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before termination takes effect."

Loudermill, supra, at 543 (citations omitted).

"We have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing before he is deprived of any significant property interest'."

Id. at 542 (citations omitted).

The "root requirement" is not afforded Alaska's teachers either by the plain language of AS 14.20.180, or under the Ninth Circuit's statutory construction. The pretermination hearing mandated by Loudermill, is circumvented completely by the Ninth Circuit's reading of the statute's "effective" date of termination to occur after a 15 day request period has expired. This is true because, in practice as is shown in this case, the termination is already in "effect" before the employee is ever given an opportunity to seek a hearing. The employer has already invoked its discretion and has already acted to exercise its discretion by communicating to the employee, unequivocal notice that he/she has been terminated.

Teacher was told "you have been terminated" (App. H, *infra*, 63a). At this point, salary has been stopped. At this point, classroom access has been denied. At this point, the "decisionmaker" (Personnel Director, herein) has removed himself/herself from the decision-making loop. At this point, the teacher's only recourse is an appeal to the school board to reverse the Personnel Director's prior decision to terminate.

"When" has the time passed for "meaningful opportunity to invoke the discretion of the decisionmaker"? *See*, Id. at 543

(emphasis added). When is the opportunity still a pretermination hearing and when does the opportunity effectually become a post-termination appeal?

Fourteen years after announcing "what" process is due, the time has come to formulate a definitive test instructing "when" that process must be given.

II. The Ninth Circuit's criterion upon non-moving parties in order to withstand summary judgment motions, imposes an impossible burden of proof requirement and creates an irreconcilable conflict between precedents.

A. It is impossible to prove "non-reinstatement."

In the Ninth Circuit, Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986), is applied where a non-occurrence is the core factual element of a cause of action (e.g. non-reinstatement of tenure, hence a wrongful termination). The result is that the non-moving party is required to do the impossible, to prove a negative, in order to withstand a motion for summary judgment. Illustrative of the impossible burden requirement is the following district court quote from, and application of, Celotex (*see*, App. E, *infra*, 21a).

> "[T]he plain language of 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party['s] case, and on which that party will bear the burden of proof at trial."
>
> Id. at 322.

Bound by the precedent of Celotex, the district court placed the burden upon teacher to prove non-reinstatement of tenure. "McGinnis offers no evidence to support her argument that

she never was reinstated" (App. E, *infra*, 34a). Had the court kept the burden upon the moving party an initial inquiry would have been necessary into what actions must the employer show (as the moving party) that it took, in order to even raise a credible claim that it had reinstated employment.

Pursuant to Alaska statutes and precedents in tenured teaching cases, an employer must tender to the teacher a written contract,[1] textbooks,[2] and back pay.[3] The record below established: (a) A 71 day period had lapsed after the state court ordered that teacher be "immediately" reinstated (App. G, *infra*, 61a); (b) Teacher came from California to the Anchorage job site, but the benefits package and the "contract was not available at the high school when Karen [a personnel department employee] said it would be." (App. E, *infra*, 17, 23a); (c) The high school principal's affidavit stated that he was "unable" to provide textbooks (App. J, *infra*, 68a at ¶7), and; (d) The employer conceded it never paid $2,700 of back pay it acknowledged it owed teacher, but asserted recovery was barred by the statute of limitations (*see*, App. E, *infra*, 29a).

Ignoring completely the state law requirements of tender of a contract, textbooks, and back pay, the district court did not give any indication of what evidence, if any, could be offered to meet its negative proof test pursuant to Celotex, in cases where non-reinstatement is alleged. The court only made clear its view that under Celotex, "[t]he moving party need not present evidence..." (App. E, *infra*, 39a). This view was adopted by the court of appeals that affirmed the summary judgments, "for the reasons stated by the district court in its orders" (App. A, *infra*, 3a).

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[1] Redman v. Department of Education, 519 P.2d 760, 765 (Alaska 1974).

[2] Board of Education, Fairbanks North Star Borough School District v. Ewig, 609 P.2d 10, 13-14 (Alaska 1980).

[3] University of Alaska v. Chauvin, 591 P.2d 1234, 1239 (Alaska 1974); *see also*, Kodiak Oilfield Haulers, Inc. v. Local 879, 641 P.2d 11, 14 (Alaska 1982).

The Ninth Circuit's present criterion under Celotex, calls upon this Court to provide clarification and guidance to the Ninth Circuit of how to apply Celotex, in employment cases where the core allegation involves non-reinstatement of the employee.

B. An irreconcilable conflict presently exists between the Ninth Circuit's negative proof test and the requirement to draw inference(s) in favor of the non-moving party.

Lay aside the impossible burden of proof aspect, requiring the non-moving party to prove non-events creates a direct conflict with the long line of precedents that stand for the proposition that on motion for summary judgment, every fact is to be viewed, and every reasonable inference is to be drawn, in favor of the non-moving party. *See e.g.*, City of Vernon v. Southern California Edison, 955 F.2d 1361, 1365 (9th Cir. 1992); Jones v. Wadsworth, 791 P.2d 1013, 1015 (Alaska 1990).

Illustrative of the present conflict is that, despite the district court's evidentiary finding that the employer had never tendered a contract to teacher at any point during the 71 days after the state court ordered reinstatement, the district court still felt bound by Celotex, to analyze the key fact of non-tender of a contract in negative inference terms as follows:

> "The only evidence to support the allegation that ASD had no contract with McGinnis is that a contract was not available at the high school when Karen [a personnel department employee] said it would be. This is some evidence from which an inference could be drawn, but it is too little in light of the other evidence to be credited (i.e., the state court ordered that McGinnis be reinstated and the correspondence between ASD and McGinnis all indicates that she had [asked the employer to provide (*see*, App. E, *infra*,

> 17a)] a contract). In short, McGinnis' argument that she was told she was reinstated but really was not is too implausible to rest on such a slender reed."
>
> (App. E, *infra*, 23a).

Where a non-occurrence such as "non-reinstatement" gives rise to a cause of action, the Ninth Circuit's inferences are against the non-moving party, and in direct conflict with settled precedent of, in who's favor, inference must be drawn on motion for summary judgment. Under the Ninth Circuit's current view that, "[t]he moving party need not present evidence" (App. E, *infra*, 39a), the outcome in non-reinstatement cases is a foregone conclusion. From the outset under this test, inference is against the complainant's allegation of non-reinstatement and the moving party merely has to deny the allegation, without offering any proof, in order to receive summary judgment in its favor.

III. *De novo* review is denied *ipso facto* when a court of appeals affirms summary judgments on briefs and solely "for the reasons stated by the district court in its orders": A narrow, definitive rule is warranted.

Constitutional due process mandates a fair hearing of the merits of an appeal. *See, e.g.*, Ward v. Village of Monroeville, 409 U.S. 57, 61-62, 93 S.Ct. 80, 83-84 (1972). Summary judgment has denied a jury trial on the merits of the causes of action, so the strict *de novo* level of scrutiny is required of appeals from summary judgment. *See*, City of Vernon v. Southern California Edison, supra, at 1365. *De novo*, literally and in practice, means consideration anew of the entire matter. *See, e.g.*, United States v. Silverman, 861 F.2d 571, 576 (9th Cir. 1988). The court of appeals is bound to arrive at its decision **independent of** any inference reached and **independent of the analysis** or the decision of the district court. Id. at 576.

Below, summary judgments on fifteen causes of action involving four defendants were affirmed by the court of appeals without remark except "for the reasons stated by the district court in its orders" (App. A, *infra*, 3a). Four separate judgments below compelled four separate sets of briefs on appeal (approximately 500 pages including the excerpts of the record). Therein, a total of twenty-eight reversible, legal errors, were shown. On the eve of hearing, teacher's counsel took ill and notified the court of his illness and inability to attend oral argument. Thirteen days later the court of appeals rendered its one sentence decision (App. A, *infra*, 1a-3a). Subsequently, the court of appeals denied a timely filed request for rehearing (App. B, *infra*, 4a-6a).

Has independent review occurred? "[F]or the reasons stated by the district court in its orders" is dependent upon the district court's inferences and analysis. The decision indicates that the court of appeals looked at the orders below, and nothing more.

Teacher proffers that a narrow, definitive rule is needed to guide courts of appeal, in cases where *de novo* is the standard of review, to demonstrate an independent review and independent analysis of the matters appealed. The alternative, as shown herein, is a "rubber-stamp" function of the court of appeals that denies due process to a fair review and thus a fair hearing on the merits.

IV. Guidance is needed by the Ninth Circuit as to the criteria to be used to evaluate the merit of appeals, for the purpose of sanctioning appellants, that rely upon state law and upon the state's highest court's interpretation of that law to show the appeal has merit.

The Ninth Circuit's levy of sanctions below demonstrates the Ninth Circuit's flawed criterion for invoking Federal Rules of Appellate Procedure, Rule 38, in appeals that arise under state law precedent. In its one, and only, remark on Alaska precedent the court of appeals in its Order On Sanctions announced a conclusion

that is opposite the holding of the case it cited.

> "Alaska law..., provided McGinnis [teacher] with the pre-termination right to a hearing, because 'termination is not effective until at least fifteen days following the notification of dismissal'."
>
> (App. D, *infra*, 13a, *quoting*, Kenai Peninsula Borough Bd. Of Educ. v. Brown, supra, at 1037).

The court of appeal's quote is dicta that the Alaska Supreme Court rejected in its holding in Brown, as stated on the very next page, after its analysis of due process requirements.

> "Applying the above procedural analysis to Brown's dismissal, we find that the May 3 meeting **resulted in a dismissal prior to a hearing in violation of Brown's due process rights**."
>
> Id. at 1038 (emphasis added).

There is only one difference between the dismissal in Brown, and the dismissal of this teacher: Mr. Brown was told **in-person** that he "had been terminated" and had 15 days to request a hearing; whereas, this teacher was told ***in writing*** that she "had been terminated" and had 15 days to request a hearing. When it told teacher "you have been terminated" (App. H, *infra*, 63a) the employer had allowed 76 days to lapse without complying with the state court's reinstatement order, and it offered the 15 day period to appeal its termination decision that the Alaska Supreme Court had rejected in Mr. Brown's case. The Brown, precedent is squarely, directly on-point.

There is a real question of whether the court of appeals read precedent at all, or instead *merely copied* the district court's views and its identical quote from Brown (*compare*, App. D, *infra*, 12a, and App. E, *infra*, 30a). Teacher was not only denied benefit of *stare decisis* of state law precedent by the court of appeals, she was sanctioned under present Ninth Circuit criterion for

determining when Federal Rules of Appellate Procedure, Rule 38 sanctions may be levied (App. D, *infra*, 11a-13a).

The only way to show that merit exists for appeals from summary judgments is to show that the causes of action were meritorious because they were warranted under state or federal law, and that they were incorrectly adjudicated below despite the existence of merit. Teacher made that showing as to each one of the four defendants in her briefs of twenty-eight specific legal errors of the district court. Teacher renewed that showing in summary format by submitting a concise 33 page brief, pinpoint citing to law and fact showing merit in her case and the appeal as to each of the four defendants, filed in response to the court of appeals' order (*compare*, App. I, *infra*, 64a-67a (cover and table of contents), and App. C, *infra*, 7a-9a).

The court of appeals characterized teacher's showing of merit to it as follows:

> "No attempt is made to justify any of the other complaints, including the one to the effect that the Anchorage School district failed to offer McGinnis a contract of reinstatement (therefore, there was nothing to terminate)."
>
> (App. D, *infra*, 12a).

The merit of teacher's state law claims included a showing of an attorney's negligence *per se* upon his affidavit testimony to the district court that he "abandoned" (App. J, *infra*, 70a) pending litigation he had commenced on teacher's behalf. The attorney disputed only the amount due, claiming it was $27; whereas, as shown by teacher's briefs if calculated pursuant to Alaska law the amount due exceeds $30,000. Another example of the merit shown under state law claims is the appeal from the district court's error and inconsistent application of Alaska's "discovery rule." The court dismissed as time barred the cause of action for the employer's admitted withholding/conversion of $2,700 of teacher's back pay (*see*, App. E, *infra*, 29a) after the state court had ordered

the employer to reinstate teacher. But, in the preceding paragraph, on the identical facts showing the employer's misrepresentations to the effect that it would reinstate teacher, the court had just determined that, "McGinnis could not have known she was injured by any misrepresentations until her employment was terminated [for the second time]" (App. E, *infra*, 29a, emphasis added).

Where state law claims are part of the summarily adjudicated causes of action on appeal, the Ninth Circuit's criterion prior to levying sanctions under Rule 38, presently lacks any requirement upon the court to demonstrate where or how the appeals deviate from the outcomes required pursuant to a state's highest court's interpretation of relevant state law and upon which the appeals rely for their basis. The Ninth Circuit demonstrated at bar, reliance upon a *we don't know but whatever the district court said is okay with us* criterion that fails the parties, the judicial system, and fails miserably the very precept of justice under law.

V. Either confusion regarding precedent or a deliberate refusal to follow precedent is shown by the Ninth Circuit's decisions that are directly counter to the outcome required by precedents of the highest court of the State and precedent of the Supreme Court of the United States.

Loudermill, clearly stands for the proposition that a government employer may not act to terminate a vested property interest in public employment without first giving the employee an opportunity for a pretermination hearing. *See*, Cleveland Board of Education v. Loudermill, supra, at 532, 545-546. It follows that the employer's offer of a hearing after it has told the employee he/she ***has been*** terminated cannot be pretermination, because the hearing comes after "a meaningful opportunity to invoke the discretion of the decisionmaker" has passed. *See*, Id. at 543.

Precedent interpreting Alaska's statute governing

termination of tenured university professors is in-line with the pretermination process required by Loudermill. *See*, Odum v. University of Alaska, Anchorage, 845 P.2d 432 (Alaska 1993). The court in Odum, opined that the procedural protections of Alaska's statute "are most important before termination." Id. at 435. Further, "[a] post-termination hearing which complies with the requirements of the [Alaska statute] does not cure the failure of a pre-termination hearing to comply with the [Alaska statute]." Id.

If a flawed pretermination hearing cannot be cured by a post-termination hearing, then a dismissal without a pretermination hearing at all surely cannot be cured by merely offering opportunity to appeal the employer's termination action by requesting a hearing before the school board. The Alaska Supreme Court's decision in Brown,[4] even though it pre-dates Loudermill, supports the conclusion that a pretermination hearing, at a meaningful time, must also be given Alaska's school teachers under AS 14.20.180.

The Ninth Circuit's opposite conclusion denies this teacher, and other Alaska school teachers, the benefits of *stare decisis*.

CONCLUSION

This petition for a writ of certiorari merits your grant of review.

Respectfully submitted,
Sherry L. McGinnis
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[4] Kenai Peninsula Borough Bd. Of Educ. v. Brown, supra, at 1034, 1038.

Appendix A

FILED
Dec 21 1998
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHERRY McGINNIS, Plaintiff-Appellant, v. ANCHORAGE SCHOOL DISTRICT, Defendant-Appellee.	)	No. 97-35638 D.C. No. CV-94-00385-JWS
SHERRY McGINNIS, Plaintiff-Appellant, v. ANCHORAGE SCHOOL DISTRICT; JOHN PATTERSON; CHANCY CROFT, Defendants, and ANCHORAGE EDUCATION ASSOCIATION, Defendant-Appellee.	)	No. 97-35829 D.C. No. CV-94-00385-JWS
SHERRY McGINNIS,	)	No. 97-36030

Plaintiff-Appellant,	)	D.C. No. CV-94-00385-JWS
	)	
v.	)	
	)	
ANCHORAGE SCHOOL DISTRICT; ANCHORAGE EDUCATION ASSOCIATION; CHANCY CROFT; Defendants, and	)	
	)	
JOHN PATTERSON Defendant-Appellee	)	
	)	
SHERRY McGINNIS, Plaintiff-Appellant,	)	No. 97-35297 D.C: No. CV-94-00385-JWS/AHB
v.	)	
	)	MEMORANDUM*
ANCHORAGE SCHOOL DISTRICT; ANCHORAGE EDUCATION ASSOCIATION; JOHN PATTERSON Defendants, and CHANCY CROFT, Defendant-Appellee.	)	

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeals from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Submitted December 8, 1998**
Seattle, Washington

Before: REAVLEY,***GRABER, and McKEOWN, Circuit Judges.

The judgment is affirmed for the reasons stated by the district court in its orders of July 5, 1996, April 4, 1997, April 10, 1997, and May 27, 1997,and in the light of the stipulations and orders of June 27, 1997, and October 31, 1997.

Pursuant to Fed.R. App. P. 38, counsel for appellant is directed to submit to this court a written response, to be filed within fifteen days of the date of this memorandum, showing cause why he should not be ordered to pay damages and costs for filing a frivolous appeal and, further, why he should not be ordered to pay the expenses incurred by appellees due to travel and presentation in Seattle for oral argument in this case while he failed to appear or give sufficient notice to counsel that he would fail to do so.

AFFIRMED.

**Upon appellant's failure to appear, the court unanimously determined that the case was suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

***Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

Appendix B

FILED
Feb 12 1999
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHERRY McGINNIS, Plaintiff-Appellant, v. ANCHORAGE SCHOOL DISTRICT, Defendant-Appellee.	)	No. 97-35638 D.C. No. CV-94-00385-JWS
SHERRY McGINNIS, Plaintiff-Appellant, v. ANCHORAGE SCHOOL DISTRICT; JOHN PATTERSON; CHANCY CROFT, Defendants, and ANCHORAGE EDUCATION ASSOCIATION, Defendant-Appellee.	)	No. 97-35829 D.C. No. CV-94-00385-JWS

SHERRY McGINNIS, Plaintiff-Appellant, v. ANCHORAGE SCHOOL DISTRICT; ANCHORAGE EDUCATION ASSOCIATION; CHANCY CROFT, Defendants, and JOHN PATTERSON, Defendant-Appellee.	)	No. 97-36030 D.C. No. CV-94-00385-JWS
SHERRY McGINNIS, Plaintiff-Appellant, v. ANCHORAGE SCHOOL DISTRICT; ANCHORAGE EDUCATION ASSOCIATION; JOHN PATTERSON Defendants, and CHANCY CROFT, Defendant-Appellee.	)	No. 97-35297 D.C. No. CV-94-00385-JWS/AHB ORDER

Before: REAVLEY,[1] GRABER, and McKEOWN, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Graber and McKeown have voted to reject the suggestion for rehearing en banc, and Judge Reavley has so recommended.

The full court has been advised on the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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[1] Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

Appendix C

FILED
Jan 27 1999
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHERRY McGINNIS, Plaintiff-Appellant, v. ANCHORAGE SCHOOL DISTRICT, Defendant-Appellee.	)	No. 97-35638 D.C. No. CV-94-00385-JWS
SHERRY McGINNIS, Plaintiff-Appellant, v. ANCHORAGE SCHOOL DISTRICT; JOHN PATTERSON; CHANCY CROFT, Defendants, and ANCHORAGE EDUCATION ASSOCIATION, Defendant-Appellee.	)	No. 97-35829 D.C. No. CV-94-00385-JWS

SHERRY McGINNIS, Plaintiff-Appellant,	)	No. 97-36030
	)	D.C. No. CV-94-00385-JWS
v.	)	
ANCHORAGE SCHOOL DISTRICT; ANCHORAGE EDUCATION ASSOCIATION; CHANCY CROFT, Defendants, and	)	
JOHN PATTERSON,	)	
SHERRY McGINNIS, Plaintiff-Appellant,	)	No. 97-35297
	)	D.C. No. CV-94-00385-JWS/AHB
v.	)	
	)	ORDER
ANCHORAGE SCHOOL DISTRICT; ANCHORAGE EDUCATION ASSOCIATION; JOHN PATTERSON, Defendants, and	)	
CHANCY CROFT, Defendant-Appellee.	)	

Before: REAVLEY,[1] GRABER, and MCKEOWN, Circuit Judges.

Plaintiff-appellant's counsel, within ten days of the date of this order, shall:

1. Provide to the court proof that counsel had planned to attend oral argument, before taking ill, such as evidence of airline or hotel reservations.

2. Show cause why plaintiff should not be held responsible for fees pursuant to Fed. R. App. P. 38, in the event that the court determines that the appeal was frivolous.

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[1] The Honorable Thomas M. Reavely, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

Appendix D

FILED
Feb 12 1999
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHERRY McGINNIS, Plaintiff-Appellant, v. ANCHORAGE SCHOOL DISTRICT, Defendant-Appellee.	)	No. 97-35638 D.C. No. CV-94-00385-JWS
SHERRY McGINNIS, Plaintiff-Appellant, v. ANCHORAGE SCHOOL DISTRICT; JOHN PATTERSON; CHANCY CROFT, Defendants, and ANCHORAGE EDUCATION ASSOCIATION, Defendant-Appellee.	)	No. 97-35829 D.C. No. CV-94-00385-JWS

SHERRY McGINNIS,	)	No. 97-36030
Plaintiff-Appellant,	)	D.C. No. CV-94-00385-JWS
	)	
v.	)	
	)	
ANCHORAGE SCHOOL DISTRICT; ANCHORAGE EDUCATION ASSOCIATION; CHANCY CROFT,	)	
Defendants, and	)	
	)	
JOHN PATTERSON,	)	
	)	
	)	
SHERRY McGINNIS,	)	No. 97-35297
Plaintiff-Appellant,	)	D.C. No. CV-94-00385-JWS/AHB
	)	
v.	)	
	)	ORDER
ANCHORAGE SCHOOL DISTRICT; ANCHORAGE EDUCATION ASSOCIATION; JOHN PATTERSON	)	
Defendants, and	)	
	)	
CHANCY CROFT,	)	
Defendant-Appellee.	)	
	)	

Before: REAVLEY,[1] GRABER, and McKEOWN, Circuit Judges.

Order on Sanctions

In the prior judgment of this court the appellant was directed to show cause why damages should not be awarded to appellees because of the frivolous appeal. Appellant has responded saying that constitutional due process was denied Sherry McGinnis because of the lack of a pre-termination hearing. No attempt is made to justify any of the other complaints, including the one to the effect that Anchorage School District failed to offer McGinnis a contract of reinstatement (therefore, there was nothing to terminate).

Assuming that McGinnis had a contract despite her refusal to go to the personnel office an conclude a contract, Alaska law and the School District provided McGinnis with the pre-termination right to a hearing, because "termination is not effective until at least fifteen days following the notification of dismissal. If the teacher does not request a hearing, the dismissal becomes effective immediately following the expiration of the fifteen day period." Kenai Peninsula Borough Bd. of Educ. v. Brown, 691 P.2d 1034, 1037 (Alaska 1984).

McGinnis was notified of her right to this hearing concerning her termination but failed to respond or take advantage of the hearing opportunity. She recognized in her argument against prescriptive bar of the action that she was not officially terminated until 15 days after the termination notice.

Finding no arguable merit in any of the multiple claims against all of these defendants and no justification for the appeals to this court, the court will award against the appellant and her counsel the sum of all reasonable an necessary fees and costs

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[1] Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

expended by all appellees in the course of defending the appeals.

Counsel for appellees are directed to file with the court by February 26, 1999, a statement of the full amount of reasonable fees and expenses incurred by the appellees in defense of the appeal of these causes.

Appendix E

FILED
Jul 05 1996
United States District Court
U.S District of Alaska

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

SHERRY McGINNIS, Plaintiff, vs. ANCHORAGE SCHOOL DISTRICT, ANCHORAGE EDUCATION ASSOCIATION, and CHANCY CROFT, JOHN PATTERSON, as individuals Defendants.	) Case No. A94 - 385 CV (JWS))) ORDER FROM CHAMBERS)) (Motions for Summary) Judgment - Dockets 80, 85,) 104; Motions to Strike -) Dockets 121, 127, 139, &) 153; Motion to Dismiss and) Alternative Motion to) Compel - Docket 147;) Application for Substitution) of Counsel - Docket 174;) Amendment of Planning) and Scheduling Order

I. MOTIONS PENDING AND OTHER MATTERS ADDRESSED

AT Docket 80, defendant Anchorage Education Association ("AEA") moves for summary judgment dismissing all claims brought by plaintiff Sherry L. McGinnis against AEA. At Docket 85, defendant Anchorage School District ("ASD") moves for summary judgment dismissing all claims brought by McGinnis against ASD. At Docket 104, defendant attorney John patterson moves for summary judgment dismissing all claims brought by McGinnis against him. These issues have been fully briefed. No

party has requested oral argument, and it would not be of material aid to the court.

At Docket 121, McGinnis objects to evidence and moves to strike exhibits Patterson has submitted to support his summary judgment motion. At Docket 127, McGinnis moves to strike exhibits submitted by AEA and ASD to support their summary judgment motions. Defendants have relied on those materials but have not specifically opposed these motions. At Docket 139, Patterson objects to and moves to strike Exhibits 101 through 109. This motion has been fully briefed but is moot.

At Docket 147 defendant Chancy Croft moves to dismiss McGinnis' complaint against him for failure to prosecute and in the alternative to compel discovery. At Docket 153, McGinnis moves to strike Croft's motion to dismiss and Croft's request for discovery as untimely under the existing planning and scheduling Order.

At Docket 174, Steven C. Finely asks to appear pro hac vice for McGinnis without association of local counsel. This request has been opposed. The disposition of the preceding matters has caused the court to conclude that modifications to the planning and scheduling order are required The necessary modifications are set out below.

II. FACTS

A. BACKGROUND

On August 25, 1994, McGinnis filed a complaint in this court against ASD, AEA, Croft and Patterson.[1] The complaint alleges that McGinnis suffered an accident on ASD premises while engaged in duties related to her job as a high school teacher for ASD. Although injuries to her spine required major surgery, ASD would not accommodate her disability, refused to pay for her surgery, and wrongfully terminated her employment in April, 1989.

In August, 1989, AEA retained and employed Patterson to

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[1] Jurisdiction is based on diversity of citizenship. 28 U.S.C. §1332.

represent McGinnis. Patterson filed a complaint against ASD in state court, alleging wrongful termination and seeking: (1) a declaration that ASD's notice of termination was ineffectual, that McGinnis did not impermissibly fail to seek an administrative hearing and that ASD should provide her with a hearing; (2) an order that ASD breached its contract with McGinnis; and (3) an order that ASD's breach of agreement was wrongful and violative of public policy and a wrongful interference with her employment contract; and (4) an award of damages in excess of $35,000.

Meanwhile, McGinnis moved to California to attend law school. According to McGinnis, although Patterson initially advocated the egregiousness of ASD's conduct toward her, when he became aware that McGinnis had moved to California to pursue a new profession, he stopped communicating with her, stopped pursuing her lawsuit against ASD, and threatened to cease further prosecution of her claims unless she accepted a proposed settlement offer that she found unacceptable. More specifically, the December 10, 1990, letter to which McGinnis refers in support of this allegation discusses the proposed stipulation between ASD and McGinnis and informs her that it accomplishes more than she could accomplish in court, because it allows her to be on leave without pay for an indefinite period of time. In the letter, Patterson informs McGinnis that he cannot pursue her claim that ASD was withholding money, because that claim has nothing to do with her present lawsuit, which is designed to reinstate her as a teacher in the district. The letter advises McGinnis that her position with respect to negotiations jeopardizes the lawsuit and comprises him, and that he told AEA he would move to withdraw as her attorney if she did not accept the settlement.

McGinnis became concerned about the status of her lawsuit and hired attorney Andrew Hemenway. Hemenway discovered that on January 6, 1992, the court issued a notice and order for dismissal for lack of prosecution. According to McGinnis,

Hemenway had to contact Patterson to "jolt" him into continuing pursuit of her case. Patterson ultimately took ation to prevent dismissal, arguing to the court that the parties were in settlement negotiaitons and that ASD must respond to or oppose McGinnis' summary judgment motion. On June 16, 1992, after concluding that ASD had wrongfully terminated McGinnis, the court granted summary judgment and ordered reinstatement with no break in service.

On July 8, 1992, McGinnis wrote to Patterson, stating that she was making arrangements to return to Alaska from California to resume her teaching position in August of that year, and asking what was required to reinstate her assignment. Patterson advised her to contact ASD's personnel office. He told her he would not represent her beyond the point of achieving her reinstatement, that reinstatement had been accomplished, and that whether she is actually reinstated was in her hands. On July 27, 1992, McGinnis wrote a letter to Edward Lindquist, ASD's Executive Director of Personnel, stating that she was anxious to resume teaching, and asking for details of her assignment and a copy of her contract. McGinnis wrote to Lindquist against on August 7, 1992, and again on August 20, 1992, discussing her contract. In the August 20, 1992, letter, McGinnis told Lindquist she had received a call from Karen with ASD's personnel department, who told her she had a contract ready to be signed and that the contract and her benefits package would be available at West High School upon her arrival Tuesday morning, August 25, 1992.

McGinnis testified in her deposition that when she reported to West High School, the contract was not there, and Principal Lance Bowie told her to contract ASD officers to get the contract. However, she did not contact anyone or go to the ASD offices, did not remain at West High School and did not attend the scheduled teachers' in-service program. Instead, she left the school premises and never returned. Patterson advised her that she had a contract

with ASD by virtue of the court's order and that even though a written contract had not been tendered to her, she must go back to the school and must contact ASD's personnel department. A few days later, Patterson advised McGinnis it was his understanding that she had a written contract and should return to work as soon as possible. McGinnis never contacted nor met with ASD personnel.

On August 31, 1992, Lindquist informed McGinnis that her employment with ASD had been terminated due to unauthorized absences. The letter states in pertinent part:

> It was reported that you arrived at your assignment at West High School on Tuesday morning, August 25, told the principal you would not work without a signed contract, and you were directed to go to the Personnel Department to take care of the matter.
>
> You have neither come to the Personnel Department nor returned to your assigned location at West High School. Further, you have not contacted any District official during the period of time. Efforts to contact yo have been futile since yo have provided no phone number at which you can be reached. Your conduct in this matter has been clearly unprofessional.
>
> You have now been absent from work for five days without authorization; consequently, in accordance with Alaska Statutes Sec. 14.20.170a(3) and School Board Policy 537.61, you have been terminated. A copy of these provisions is attached.

> You May request a hearing before the School Board concerning your termination, if within 15 days after receipt of this notification, you submit a written request for the hearing according to the procedure which is explained in the attachment to this letter.

(Docket 104; Exh. O) McGinnis did not request a hearing before the School Board. Instead, she filed action in this court, raising the following claims: The first cause of action is against ASD for discrimination in employment. The second cause of action is against ASD for discharge in violation of public policy. The third cause of action is against ASD for misrepresentation of fact to induce relocation for employment purposes. The fourth cause of action is against ASD for breach of the implied covenant of good faith and fair dealing in an employment relationship. The fifth cause of action is against ASD for conversion. The sixth cause of action is against ASD, AEA and Patterson, for intentional misrepresentation of fact. The seventh cause of action is against AEA and Patterson for breach of contract. The eight cause of action is against AEA and patterson for negligence. The ninth cause of action is against Croft for breach of contract. The tenth cause of action is against Croft for intentional misrepresentation of fact. The eleventh cause of action is against Croft for negligence. The twelfth cause of action is against Croft for conversion. The thirteenth cause of action is against ASD, AEA and patterson for conspiracy. The fourteenth cause of action is against ASD and Croft for conspiracy. The fifteenth cause of action is against all defendants for negligent or intentional infliction of emotional distress.

B. Affidavits Submitted

1. Elizabeth O'Leary

From 1987 to 1991, O'Leary was a "Uniserv" Director for

NEA-Alaska, Inc., the state affiliate of NEA for Alaska's local teachers' unions, including AEA. O'Leary reported to NEA-Alaska's Executive Director Robert Manners and to NEA-Alaska's Board of Directors. she was neither supervised nor evaluated by AEA, and her pay checks were drawn upon an account of NEA-Alaska. On June 19, 1989, McGinnis met with O'Leary and told her that ASD had terminated her in April of 1989, and she wanted AEA's assistance to be reinstated. O'Leary explained her options. McGinnis addressed her correspondence with O'Leary in care of NEA-Alaska. On July 27, 1989, O'Leary wrote to Lindquist, stating that McGinnis was wrongfully terminated and is entitled to workers' compensation for an on-the-job injury, and requesting to know whether McGinnis can expect to return to full employment with ASD. NEA-Alaska decided to assist McGinnis and engaged Patterson to represent her. O'Leary denies having participated in any conspiracy against McGinnis.

2. Mark Jones

Mark Jones is also a Uniserv Director, employed by NEA-Alaska, not AEA. Although a principal task of his is to assist AEA and its members, he is neither paid nor supervised by AEA. It was reported to Jones that McGinnis went to West High on August 25, 1992, but left the premises when she discovered that a written contract was not waiting for her in the building. The next day, Patterson informed Jones that McGinnis had left, and Jones advised McGinnis to return to work. When Jones contacted Lindquist to obtain the contract, Lindquist told him a conference would be necessary to discuss McGinnis' absence from her duty station at West High. Jones wrote to McGinnis on August 31, 1992, warning her of the consequences of her actions and advising her to respond to ASD's request for a meeting and then return to work. Jones also wrote to McGinnis on September 3, 1992, alerting her of her rights and the deadline for her to request a hearing. Jones denies ever

having been involved in any conspiracy to injury McGinnis. According to Jones, NEA-Alaska, not AEA, selected and paid Patterson.

III. DISCUSSION

A. Motions to Strike

(omitted section - not appealed or challenged)

B. Summary Judgment Standards

Under Rule 56 (c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

> [T]he plain language of 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party['s] case, an on which that party will bear the burden of proof at trial.

Celotex Corp. V. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2522 (1986). A "scintilla" of evidence is not enough to create a genuine issue of material fact. Anderson v. Liberty Lobby, Inc, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986). Nor do "mere allegation and speculation... create a factual dispute for purposes of summary judgment." Nelson v. Pima Community College, 83 F.3d 1075, 1081-82 (9th Cir. 1996) (citing Witherow v. Paff, 52 F.3d 264, 266 (9th Cir. 1995).

C. AEA's Summary Judgment Motion

1. Intentional Misrepresentation, Breach of Contract and Negligence (Claims Six, Seven & Eight)

The complaint alleges that AEA and Patterson ignored their fiduciary duty by misinforming McGinnis regarding her rights to employment with ASD and intentionally seeking to eliminate or reduce their and ASD's exposure to liability by refusing assistance.

AEA argues that no action can lie against it for any misrepresentations attributed to O'Leary, Jones or Patterson, or for breach of contract or negligence attributed to Patterson, because they are not AEA employees or agents. With respect to O'Leary's alleged misrepresentation, AEA points out that the only false statement McGinnis attributes to O'Leary is the statement she made in 1989, that McGinnis had no remedies at law, and no injury resulted from that statement because McGinnis did not rely upon it. AEA further asserts that there is no evidence that t Jones or Patterson made any false representations, and that McGinnis disregarded their advice when she refused to tender the requested services at West High or to go to ASD headquarters to inquire about her contract. AEA argues that McGinnis' claim for breach of contract fails because NEA-Alaska, not AEA, makes all decisions about legal services to a dismissed employee, NEA-Alaska hired Patterson, who acted competently and secured full reinstatement, and McGinnis failed to follow Patterson's advice and to appeal her termination in 1992 to the school board. AEA contends that, for the same reasons, it cannot be held liable for negligently hiring Patterson, because there is no evidence that the selection was imprudent, and AEA cannot be held liable for negligently supervising Patterson, because it had no duty to do so.

McGinnis argues that by accepting her union dues, sending letters on his letterhead on her behalf, and exercising control over processing and manner of pursuit of her claims against ASD, AEA

undertook a duty of care to hire competent counsel. McGinnis contends that AEA should have fired Patterson and hired other counsel when he threatened to withdraw in an effort to coerce her to accept an inadequate settlement with ASD, failed to act diligently in pursing her case, failed to secure the contract effectuating reinstatement of her employment, and refused to pursue damages against ASD, even though he had alleged them on her behalf in the complaint.

In its answer to the complaint, AEA acknowledges that it provided McGinnis assistance in connection with her action and admits that it offered to obtain assistance for McGinnis in her dispute with ASD. AEA also admits that it contacted Patterson for consultation and invited him to represent her in litigation against ASD in connection with her employment and alleged breach of contract, and that tit paid Patterson's fees. AEA also admits that in choosing Patterson, it had a duty of due care, but alleges that it fulfilled this duty.

AEA is correct that there is no evidence of any false representations which harmed McGinnis, by any agent of AEA (including O'Leary, Jones and Patterson, who for the sake of discussion here, are assumed to be AEA agents). The only evidence to support the allegation that ASD had no contract with McGinnis is that a contract was not available at the high school when Karen said it would be. This is some evidence from which an inference could be drawn, but it is too little in light of the other evidence to be credited (i.e., the state court ordered that McGinnis be reinstated and the correspondence between ASD and McGinnis all indicates that she had a contract). In short, McGinnis' argument that she was told she was reinstated but really was not is too implausible to rest on such a slender reed. Therefore, claim six must be dismissed. With respect to AEA's obligation to McGinnis in hiring Patterson, there is no evidence to support a claim that AEA breached its contract with McGinnis or was negligent in

selecting, supervising, or failing to fire Patterson. Even if Patterson told AEA he would withdraw if McGinnis refused to accept the settlement, there is no evidence that the proposed settlement was unreasonable or that it did not resolve those issues Patterson was hired to resolve. Thus, claim seven and eight must also be dismissed.

2. Conspiracy between ASD, AEA and Patterson (Claim Thirteen)

AEA argues that there is no evidence of a conspiracy, because McGinnis has no knowledge as to when alleged conspiracy began, as to any overt act that was performed in furtherance of it, or as to what steps AEA should have taken after she won her lawsuit and was reinstated. McGinnis presents no argument in opposition to this assertion, nor does the record contain evidence supporting a conspiracy claim against AEA. Consequently, the thirteenth cause of action must be dismissed.

3. Emotional Distress (Claim Fifteen)

The complaint alleges that all defendants knew or should have known that McGinnis' spinal injuries diminished her physical and mental capability and that her physical and emotional conditions were weakened, rendering her more vulnerable to abuse by defendants. in her negligence claim against AEA, Mcginnis alleges that as a result of AEA and Patterson's failure to utilize the requisite degree of care on her behalf, she "has suffered and continues to suffer severe emotional injury, manifest by irritability, loss of sleep, increased frequency in number and intensity of headaches, upset stomachs and other emotionally related physical symptoms."

AEA argues that the evidence does not support McGinnis' claims for negligent or intentional infliction of emotional distress, because McGinnis agrees that no AEA officer or employee of AEA had personal hostility towards her. McGinnis does not respond to this argument, although her affidavit states that she has "continuing

illness including headaches, stomach disorders, problems sleeping, and anxiety and depression which are directly related to acts and omissions of ASD and the other Defendants . . ." (Docket 128; McGinnis affidavit).

"Whenever a defendant stands in a contractual or fiduciary relationship with the plaintiff and the nature of this relationship imposes on the defendant a duty to refrain from conduct that would foreseeably result in emotional harm to the plaintiff, the plaintiff need not establish a physical injury in order to recover for the negligent infliction of emotional distress."Chizmar v. Mackie, 896 P.2d 196, 203 (Alaska 1995) (citing Hancock v. Northcutt, 808 P.2d 251, 257 (Alaska 1991). This rule appl[i]es only to relationships that are "highly personal and leaden with emotion,' such as "contracts to marry, to conduct a funeral, to sell a sealed casket, to conduct a cesarean birth, to surgically rebuild a nose, to provide promised maternity medical coverage, to provide medical services, and to keep a daughter informed of her mother's health." Hancock, 808 P.2d at 258-59 (footnote omitted). The relationship between AEA and McGinnis was not the type of relationship contemplated by Hancock or Chizmar.

With respect to alleged intentional infliction of emotional distress: [O]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress. . . . Croft v. Wicker, 737 P.2d 789, 792 (Alaska 1987) (quoting Restatement (Second) of Torts § 46 (1) (1965). The elements necessary to support a prima facie cause of action for IIED were set forth in Teamsters Local 959 v. Wells, 749 P.2d 349, 357 (Alaska 1988): "(1) the conduct is extreme and outrageous, (20) the conduct is intentional or reckless, (3) the conduct causes emotional distress and (4) the distress is severe." See also Cameron v. Beard, 864 P.2d 538, 548 (Alaska 1993). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in

degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Oaksmith v. Brusich, 774 P.2d 191, 200 (Alaska 1989) (quoting Restatement (Second) of Torts § 46 cmt. d (1964)).

If reasonable jurors could differ as to whether the evidence adduced at trial would satisfy these elements, the superior court is required to submit the IIED claim to the jury. Teamsters, 749 P.2d at 357-58. However, as a threshold matter, the court must determine "whether the severity of the emotional distress and the conduct of the offending party warrant an instruction on intentional infliction of emotional distress." Id. at 357; Richardson v. Fairbanks N. Star Borough, 705 P.2d 454, 456 (Alaska 1985). Chizmar, 896 P.2d at 208-09. Here, there is no evidence and, thus, no reasonable jury could fined, that AEA's conduct was extreme and outrageous, intentional or reckless. Claim fifteen must be dismissed.

D. Patterson's Summary Judgment Motion

1. Intentional Misrepresentation (Claim Six)

McGinnis testified that Patterson misrepresented that she would be given her job back if she contacted ASD and made arrangements, and he informed her that she had a contract when he knew she did not. However, McGinnis admits she did not follow Patterson's instruction to contact ASD's personnel office to arrange to sign the contract, and she offers no evidence that if she had followed Patterson's instruction, she would not have been reinstated. Given that the state court ordered reinstatement, and given that all correspondence between McGinnis and ASD indicated that McGinnis had a contract, the evidence does not support McGinnis' assertion that Patterson knew she had no contract. Nor is there evidence that if McGinnis had followed Patterson's advice, she would still have been terminated. Therefore, McGinnis has not established that any alleged

misrepresentation caused any injury, and claim six must be dismissed.

2. Breach of Contract and Negligence (Claims Seven & Eight)

McGinnis alleges that Patterson breached his contractual duties and was negligent when he ceased pursuit of her case, failed to ensure that she was reinstated, failed to seek compensation for her employment and all benefits appurtenant, failed to seek reimbursement for civil contract and tort damages he alleged in the complaint, and failed to recover the $2,000 in wages by his "derelict instruction" to not cash certain checks ASD had sent her.

Patterson argues that he did not breach his contract and was not negligent, because he obtained summary judgment ordering ASD to reinstate her, and because the evidence establishes that the only reason she was not reinstated was because she refused to contact and cooperate with ASD to arrange to sign her contract. Patterson states that he never agreed to pursue contract or tort damages for McGinnis, nor is there evidence that McGinnis suffered any monetary damages as a result of the 1989 termination, nor is there legal authority supporting the proposition that an attorney's drafting of allegations in a complaint constitutes an agreement that he or she will do a particular thing or accomplish a particular result. According to Patterson, the prayer for damages in excess of $35,000 was a necessary demand to satisfy the then-applicable jurisdictional amount in controversy requirement for bringing an action in the state superior court, and McGinnis has provided no evidence that she has suffered monetary damages as a result of the 1989 termination.

There is no evidence to support McGinnis' claim that Patterson breached his contract or was negligent with respect to the reinstatement once it was ordered by the superior court. Nor is there evidence that McGinnis is entitled to monetary tort and contract damages which Patterson failed to obtain. However, it

remains a disputed question of material fact whether Patterson breached his duties owned McGinnis when he temporarily ceased pursuit of the case, causing McGinnis to suffer monetary damages in the amount she paid to retain Hemenway. Claims seven and eight thus remain but are limited to the question presented above.

3. Conspiracy between ASD, AEA and Patterson (Claim Thirteen)

Patterson argues that there is no evidence of a conspiracy between him, ASD and AEA. McGinnis suggests that a jury could reasonably infer that after she moved to California to start a new profession, ASD, AEA, Patterson and Croft conspired to avoid further animosity among their peer group to avoid reemploying a dedicated teacher who had upset high level school administrators by exposing misconduct of ASD personnel through grievance process, and to avoid future difficulties. Patterson's roll in this conspiracy would have been to withdraw effective assistance of counsel and to stop pursuing McGinnis' case, possibly in exchange for money. Because there is no evidence to support this theory, claim thirteen must be dismissed.

4. Infliction of Emotional Distress (Claim Fifteen)

Patterson argues that there is no evidence to support the claim for emotional distress. The court agrees. Claim fifteen is dismissed with respect to Patterson.

E. ASD's Summary Judgment Motion

1. Statute of Limitations (Claims One, Two, Three, Five, Six, and Fifteen)

ASD argues that the statute of limitations bars claims one, two, three, five, six, and fifteen because, with the exception of the August 31, 1992 termination letter, all actions giving rise to those claims occurred long before two years preceding August 25, 1994, the date the complaint was filed. McGinnis argues that she did not discover the injury until she was officially terminated, which would

have been 15 days after the termination letter.

Most of Mcginnis' claims are not barred by the statute of limitations because, under the facts alleged in the complaint, she did not discover the alleged discrimination or misrepresentations of fact until August 25, 1992, when she arrived at the school to find no written contract. Claim one, which alleges employment discrimination, is partially based on the alleged denial of access to employment in 1992. Therefore, claim one remains. Claim two, which alleges discharge in violation of public policy, is based partially on the alleged false representation ASD made to McGinnis that she could continue employment, followed by the denial of access to employment and the ensuing "retermination" Claim two thus remains. Claim three alleges misrepresentation of fact to induce relocation for employment purposes and is based partially on the failure to confirm employment by providing McGinnis a written contract. Viewing the facts as alleged, McGinnis could not have known she was injured by any misrepresentations until her employment was terminated. Thus, claim three remains. Similarly, claim six, which alleges intentional misrepresentation of fact, and claim fifteen, which alleges infliction of emotional distress, appear to include the 1992 termination and, thus, must remain.[3]

Only claim five for conversion is barred by the statute of limitations. McGinnis clearly knew or should have known long before August 25, 1992, that ASD owed her money for teaching services performed before the initial termination in 1989. Claim five is dismissed.

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[3] In footnote two of its memorandum at Docket 85, ASD joins in and supports AEA's summary judgment motion "to the extent that any claim, issue or ruling has any applicability to the claims against Anchorage School District, such as the sixth, thirteenth and fifteenth causes of action. However, ASD does not provide the court with sufficient information or argument to ascertain whether and how the court's rulings with respect to AEA apply to ASD.

2. Exhaustion of Administrative Remedies (Claims Two, Four & Thirteen)

ASD argues that claims two, four and thirteen are barred by McGinnis' failure to exhaust administrative remedies. McGinnis argues that there was no administrative remedy, because she was never actually reinstated and, thus, was never terminated.

> A tenured teacher's due process rights prior to dismissal are set forth in AS 14.20.180. The Board must notify the teacher of the dismissal and provide "a statement of cause and a complete bill of particulars." The teacher may then request a public or private hearing and other rights, such as representation by counsel and cross-examination, are granted during the hearing. This hearing is to be held prior to an effective dismissal. A pre-termination hearing is consistent with due process and AS 14.20.180.

Kenai Peninsula Borough Bd. of Educ. v. Brown, 691 P.2d 1034, 1036 - 37 (Alaska 1984) (footnote omitted). The tenured teacher may, within 15 days immediately following receipt of the notification [of dismissal or nonretention], notify the employer in writing that a hearing before the school board is requested." AS 14.20.80 (b). "Thus, the termination is not effective until at least fifteen days following the notification of dismissal. If the teacher does not request a hearing, the dismissal becomes effective immediately following the expiration of the fifteen day period." Brown, 691 P.2d at 1037.

"[W]hen grievance procedures are available, an employee must exhaust contractual or administrative remedies before pursuing a direct judicial action against the employer." Pederson-Szafan v. Baily, 837 P.2d 124, 128 (Alaska 1992) (citing Casey v. City of Fairbanks, 670 P.2d 1133, 1136 (Alaska 1983). Beard v.

Baum, 796 P.2d 1344, 1348 (Alaska 1990)). "The requirement that an aggrieved employee exhaust administrative remedies is inapplicable, however, 'where the administrative remedy is inadequate or where the pursuit of the administrative remedy would be futile due to the certainty of an adverse decision.'" Romulus v. Anchorage Sch. Dist., 910 P.2d 610, 615 (Alaska 1996) (quoting Eidelson v. Archer, 645 P.2d 171, 181 (Alaska 1982)).

During her deposition, McGinnis was asked if, after learning she had been terminated on August 31, 1992, she took any steps to request a hearing under Alaska law as a tenured teacher. She responded that she did not, because she believed it would be futile in light of ASD's past conduct. However, there is no evidence to support this statement. See, Romulus, 910 P.2d at 615 ("A grievance process appears futile when the person who ordered the adverse employment decision presides over its appeal"). McGinnis offers no evidence to support her argument that she never was reinstated. In fact, the complaint specifically alleges that ASD terminated her tenured employment. By this, she cannot be referring to the 1989 termination, because the statute of limitations clearly had run with respect to it. Thus, the second, fourth and thirteenth causes of action must be dismissed for failure to exhaust administrative remedies.

3. Conspiracy between ASD and Croft (Claim Fourteen)

Claim fourteen alleges that Croft entered into a secret promise that Croft would not pursue further action against ASD on behalf of McGinnis, depriving her of reimbursement for medical expenses and interest. The complaint states that ASD and Croft "conspired with each other to commit the tortious conduct as alleged and by reason of the conspiracy and concerted efforts by these Defendants and each of them inflicted severe emotional distress upon Plaintiff and deprived Plaintiff of reimbursement for medial expenses and interest and penalty as provided by law"

(Docket 1, pg. 27). ASD argues that the could should dismiss the claim because the Alaska Workers' Compensation Act precludes her from asserting common law tort claims for damages.

AS 23.30.045 contains the provisions regarding the employer's liability for workers' compensation. "The liability of an employer prescribed in AS 23.30.45 is exclusive and in place of all other liability of the employer. . ." AS 23.30.055. "However, if an employer fails to secure payment of compensation as required by this chapter, an injured employee or the employee's legal representative in case death results from the injury may elect to claim compensation under this chapter, or to maintain an action against the employer at law or in admiralty for damages on account of the injury or death." Id. Furthermore, "[a]n exception to the exclusivity provisions of AS 23.30.055 exists in cases of an employer's, or fellow employee's, intentional torts committed against the employee." Williams v. Mammoth of Alaska, Inc., 890 P.2d 581, 185 (Alaska 1995) (citing Van Biene v. ERA Helicopters, Inc., 779 P.2d 315, 318 (Alaska 1989).

McGinnis seeks redress against ASD for an alleged conspiracy to deny her benefits to which she was entitled. ASD does not challenge the existence of evidence to support claim fourteen, only McGinnis' right to pursue the claim. Because the alleged civil conspiracy to deny benefits is an intentional tort, claim fourteen remains.[6]

4. Emotional Distress (Claim Fifteen)

The fifteenth cause of action alleges negligent or intentional infliction of emotional distress. ASD argues that McGinnis cannot recover for negligent infliction of emotional distress, because her employment contract was not the type of contract which would establish a sufficient preexisting duty, nor was it "highly personal

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[6] The Court is not making a finding that there is evidence to support this claim. As noted, ASD has not argued any lack of evidence.

and laden with emotion," and because she offers no facts which would establish that she suffered severe or serious emotional distress. Chizmar, 896 P.2d at 203. With respect to the claim of intentional infliction of emotional distress, ASD argues that McGinnis has failed to offer evidence that ASD's conduct was extreme and outrageous, intentional or reckless, and that the distress was severe. Id., 896 P.2d at 208. McGinnis argues that the extent of the injuries is for the jury to decide. Her affidavit sates that she has "continuing illness including headaches, stomach disorders, problems sleeping, and anxiety and depression which are directly related to acts an omissions of ASD and the other Defendants." (Docket 128; McGinnis affidavit). McGinnis argues that ASD's response to the judgment against it ordering her full reinstatement was to escalate its behavior by substantively ignoring the court's order, tricking her into relocating to Alaska from California on its false promise of employment, and engaging in a cover-up attempt.

The court agrees that the present state of the evidence leaves a disputed issue of material fact concerning the extent of the alleged injuries. They may be serious enough to support McGinnis' claims. However, the employment contract does not embody the close relationship required to create a duty whose negligent violation could give rise to a claim for emotional distress. With one exception, taking the evidence in the light most favorable to McGinnis, ASD's alleged conduct cannot be characterized as adequate to support a claim for intentional infliction of emotional distress. The one exception is the claim that ASD agreed with Croft to deny McGinnis' benefits. Consequently, claim fifteen is dismissed with respect to ASD, except for the claim that ASD intentionally deprived McGinnis of benefits.

F. Motions at Dockets 147 and 153

At Docket 147 defendant Croft has moved to dismiss plaintiff's complaint against him for failure to prosecute and in the

alternative to compel discovery. At docket 153 plaintiff has moved to strike Croft's motion to dismiss and Croft's request for discovery as untimely under the existing planning and scheduling order. McGinnis is correct. The motion is untimely and good cause for filing late has not been established. The motion at Docket 147 is hereby stricken and the motion at Docket 153 is granted.

In view of the fact that the court is reopening discovery and motion practice for a limited period for reasons discussed below, it needs to be said that with respect to the request to dismiss for failure to prosecute at Docket 147, the court's examination of the motion showed that is without merit. As to the request to compel discover also contained in the motion at Docket 47, the court's examination of the motion reveals that the request probably has merit (although, of course, McGinnis had no opportunity to oppose the motion, nor the court to consider her opposition). For these reasons, while the reopening of motion practice allows for the filing of a motion seeking the same relief as that sought at Docket 147, Croft may want to rethink the wisdom of filing a motion to dismiss for failure to prosecute. Similarly, McGinnis might be wise to promptly negotiate a stipulation with Croft providing for the necessary discovery, before that issue has to be fully briefed and decided by the court.

G. Application at Docket 174

(omitted section - not appealed or challenged)

H. Amendment to Planning and Scheduling Order

(omitted section - not appealed or challenged)

IV. CONCLUSION

For the reasons set out above, the motion at Docket 80 is

GRANTED. The motion at Docket 85 is **GRANTED** in part and **DENIED** in part as follows: As to ASD, claims two, four, five, and thirteen are dismissed. Claims one, three, six and fifteen remain. However, claim fifteen is limited to the alleged intentional infliction of emotional distress by the denial of benefits. The motion at Docket 104 is **GRANTED** in part and **DENIED** in part as follows: As to Patterson, claims six, thirteen and fifteen are dismissed. Claims seven and eight remain but are limited to the issue of whether Patterson failed to diligently pursue McGinnis' claim and damages are limited to expenses incurred in obtaining counsel to investigate and confront Patterson regarding this alleged failure.

The motions at Dockets 121 and 127 are **DENIED**, and the motion at Docket 139 is **DENIED** as moot. The motion at Docket 147 is **STRICKEN** and the motion at Docket 153 is **GRANTED**. The application at Docket 174 is **GRANTED**, but subject to the conditions discussed above. The planning and scheduling order is **AMENDED** as set out above.

DATED this 3rd day of July 1996 at Anchorage, Alaska.

s/_____
JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

A94-0385--CV (JWS)

J. Josephson
L. Croft
B. Owens (Jermain)
C. Stowers
J. Oakes
S. Finley

FILED
Jul 26 1996
United States District Court
U.S. District of Alaska

MINUTES OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

SHERRY L. MCGINNIS v.
ANCHORAGE SCHOOL DISTRICT, et al

THE HONORABLE JOHN W. SEDWICK
CASE NO. A94 - 0385 CV (JWS)
Deputy Clerk Official Recorder
Pam Richter

APPEARANCES: for PLAINTIFF: - - -
for DEFENDANT: - - -

PROCEEDINGS: **ORDER FROM CHAMBERS**

The court has considered the request for reconsideration at docket 180 and finds no merit in the arguments advanced by plaintiff. The motion at docket 180 is DENIED.
DATE: July 26, 1996

ENTERED AT JUDGE'S DIRECTION
INITIALS: prr Deputy Clerk
A94-0385--CV (JWS)

J. JOSEPHSON
L. CROFT
B. OWENS (JERMAIN)
C. STOWERS
S. FINLEY

Appendix E

FILED
April 10 1997
United States District Court
U.S. District of Alaska
By_____Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

SHERRY McGINNIS,	)
Plaintiff,	) Case No. A94 - 385 CV (JWS)
	) ORDER FROM CHAMBERS
vs.	)
	) (Re: Motions for Summary
ANCHORAGE SCHOOL	) Judgment - Docket 210)
DISTRICT, ANCHORAGE	)
EDUCATION	)
ASSOCIATION, and	)
CHANCY CROFT, JOHN	)
PATTERSON, as individuals	)
Defendants.	)
_____	)

I. MOTIONS PENDING

Plaintiff Sherry McGinnis' ("McGinnis") complaint alleged fifteen separate causes of aciton against four defendants. At docket 210, Anchorage School District ("ASD") moves for summary judgment on the remaining claims against ASD: the first cause of action alleging employment discrimination; the third cause of action for misrepresentation of facts to induce relocation for employment; the sixth cause of action for intentional misrepresentation of fact; and the fourteenth cause of action alleging a conspiracy between ASD and defendant Chancy Croft

("Croft"). The motion is opposed.[7] Oral argument has not been requested, and it would not be of material aid to the court.

II. BACKGROUND

In 1988 McGinnis suffered an injury to her back while engaged in duties related to her teaching assignment at Dimond High School in the Anchorage School District. The following year plaintiff was wrongfully discharged from employment. In 1992 the Superior Court of Alaska ordered McGinnis reinstated to employment with no break in service.

McGinnis claims that she was instructed by ASD personnel department that a contract of employment, effectively reinstating her, was ready and would be waiting along with a benefits package at West High School upon her arrival on August 25, 1992. When McGinnis reported to West High School, the contract was not there, and she was instructed to contact the personnel department. Instead of contacting the personnel department, McGinnis left the school premises and never returned. On August 31, 1992, McGinnis was informed that her employment with ASD had been terminated due to unauthorized absences. Two years later, McGinnis filed this action.

III. STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if there is no genuine dispute as to material facts and if the moving party is entitled to judgment as a matter of law. The moving party has the burden of showing that there is no genuine dispute as to material fact.

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[7]In her Opposition, McGinnis asserts that she is entitled to recover damages suffered prior to "Reinstatement" in August 1992. The judgment in her 1992 state court lawsuit resulted in an order that McGinnis immediately be offered reinstatement with no break in service. Because McGinnis does not seek such damages in her complaint, this court will not address the argument.

Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The moving party need not present evidence; it need only point out the lack of any genuine dispute as to material fact. Celotex, 477 U.S. at 323-325.

Once the moving party has met this burden, the non-moving party must set forth evidence of specific facts showing the existence of a genuine issue for trial. Id.; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-9 (1986); Adickes, 398 U.S. at 160, n22. The non--moving party may not rest upon mere allegations or denials, but must show that there is sufficient material evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial. Anderson, 477 U.S. at 248. A "scintilla" of evidence is not enough to create a genuine issue of material fact. Anderson, 477 U.S. at 252. Nor do "mere allegations and speculation...create a factual dispute for purposes of summary judgment." Nelson v. Pima Community College, 83 F.3d 1075, 1081-82 (9th Cir. 1996) (citing Witherow v. Paff, 52 F.3d 264, 266 (9th Cir. 1995)).

There is no genuine issue of material fact when the relevant evidence in the record, taken as a whole, indicates that a reasonable fact-finder could not return a verdict for the non-moving party. Anderson, 477 U.S. at 248; Matsushita Elec. Indus. Co. Ltr. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

IV DISCUSSION

A. McGinnis' First, Third, and Sixth Causes of Action

As previously mentioned, in 1992 the Superior Court of Alaska ordered ASD to reinstate McGinnis' employment with no break in service. McGinnis' first, third, and sixth causes of action are all contingent upon a finding that ASD failed to comply with the reinstatement ordered by the court. In her first cause of action, McGinnis alleges that the reinstatement process which occurred in

August 1992 was sham and that ASD discriminated against her based on her work-related injury, subsequent disability, and successful wrongful termination suit against ASD. The third cause of action claims that ASD violated AS 23.10.015 which prohibits an employer from bringing an individual into the state of Alaska to work as an employee by means of false or deceptive representations or false pretenses concerning the character of the work to be done or the amount of compensation to be paid.[9] McGinnis' sixth cause of action alleging intentional misrepresentation of fact asserts that ASD's offer of reinstatement was intentionally misleading, false, fraudulent, and calculated to achieve its wrongful purpose of eliminating or greatly reducing ASD's exposure to liability for its acts, past and contemporary, which wrongfully deprived McGinnis of her tenured employment rights under law.

McGinnis offers as support for her contentions a letter dated June 29, 1992, from J. Edward Lindquist ("Lindquist"), who at the time was ASD's Executive Director, which she claims falsely and fraudulently represented that she would be reinstated to a tenured teaching position with no break in service pursuant tot he state court ruling. Additionally, McGinnis alleges that when she showed up to begin her teaching assignment as instructed on August 25, 1992, at West High School, ASD, among other things, failed to provide her with a written contract of tenured employment.

Lindquist submits by affidavit that there was nothing false nor did he intend to be deceptive or misleading in his letter to

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[9]AS 23.10.015 provides:

> False representations to procure employees prohibited. A person doing business in this state may not personally or through and agent...bring an individual into his state to work as an employee in this state, by means of false or deceptive representations, false advertising, or false pretenses...concerning the kind and character of work to be done, or the amount and character of the compensation to be paid for the work, or the sanitary or other conditions of employment.

McGinnis. Furthermore, the affidavit of Karen Voss ("Voss"), an employee in ASD's personnel department whom McGinnis claims assured her that her teaching contract would be waiting for her at West High School, denies any agreement to have the teaching contract available for McGinnis at West High School on August 25 and states that such an agreement would be inconsistent with the custom and practice concerning teachers' contracts which are usually kept at the personnel office. Voss also states that there was teaching contract prepared for McGinnis for the 1992-3 school year at the personnel office.

While McGinnis disputes Voss' testimony regarding the custom and practice concerning teachers' contracts, the parties agree that McGinnis arrived at West High School on the morning of August 25, 1992, and left the premises after being informed by West High principal Dr. Lance Bowie ("Bowie") that her teaching contract was not at the school. McGinnis asserts that the absence of a contract constitutes failure by ASD to tender a teaching contract. The uncontroverted facts show otherwise. Principal Bowie suggested that McGinnis go to the personnel office to locate her contract. McGinnis left the school and did not return. Shortly thereafter, McGinnis was advised by her attorney, John Patterson, as well as her Anchorage Education Association representative, Mark Jones, to contact the personnel department. Instead, Mcginnis did not contact the personnel department nor report to West High School. After receiving no further contact from McGinnis, Lindquist wrote a letter dated August 31, 1992, advising that she had been terminated due to unexcused absences and informing her that she may request a hearing before the school board within 15 days after receipt of this letter. McGinnis requested no hearing and did not return to work.

A reasonable fact-finder could not return a verdict in favor of McGinnis based on these undisputed facts. No evidence is offered which establishes the falsity of any material representation

made by any person with ASD, nor is there evidence of any intention of the district to keep McGinnis from returning as a teacher for the 1992-3 school year. At the very most the evidence would support the conclusion that McGinnis was told the contract would be at the high school when it was at the District Personnel Office. Assuming there is a dispute as to this fact, it is simply not material. It is nearly inconceivable that a public agency under court order to re-employ McGinnis would tell her in writing she was being re-employed, while not standing prepared to do so. To support the inference that a public agency would do just that, McGinnis points to her understanding that she was told she could find the contract at Wet High, which proved incorrect. That scintilla of evidence will not support a finding that the contract was not in fact being offered to her in the customary channel at the District Personnel Office.

ASD did not induce McGinnis to return to Alaska, she was informed of her right to reinstatement under state court order. The fact that a teaching contract was not waiting for her at West High School upon her arrival does not rise to the level of false or deceptive representations as required under AS 23.10.015. The affidavits of Bowie and Voss indicate that, at the most, the evidence presented shows a misunderstanding which McGinnis had within her power to clarify and resolve. It is to be noted that McGinnis acted against the advice and direction given to her by her attorney, John Patterson, and her AEA representative, Mark Jones, when she failed to contact the personnel department at the administration building after being instructed that a contract was prepared and failed to request a hearing before the School Board following receipt of Lindquist's letter. ASD is entitled to summary judgment on the first, third, and sixth causes of action because a reasonable fact-finder could not, based on the aforementioned facts, return a verdict in favor of McGinnis.

B. Fourteenth Cause of Action - Conspiracy

McGinnis claims that ASD and croft entered into a "secret promise" that Croft would not pursue the workers' compensation claims for McGinnis after ASD agreed to pay Croft his statutory attorney's fees pursuant to a stipulation which was submitted to and approved by the Alaska Workers' Compensation Board. McGinnis further alleges that she suffered severe emotional distress as a result of the defendants' conspiracy to engage in tortious conduct.

McGinnis fails to submit any specific evidence to show that ASD and Croft agreed with one another to act against her unlawfully or for any unlawful purpose. In fact, McGinnis apparently concedes her fourteenth cause of action by offering no opposition to ASD's motion for summary judgment. As a result, ASD is also entitled to summary judgment on the fourteenth cause of action.

V. CONCLUSION

For the foregoing reasons, ASD's motion for summary judgment at docket 210 is GRANTED.

DATED this 10th day of April 1997 at Anchorage, Alaska.

s/_____

JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE
A94-0385--CV (JWS)

J. Josephson
I. Croft
R. Middleton (Middleton)
B. Owens (Jermain)
C. Stowers
D. Moody

Appendix E

FILED
APR 04 1997
United States District Court
U.S District of Alaska

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

SHERRY McGINNIS,	)
Plaintiff,	) Case No. A94 - 385 CV (JWS)
	) ORDER FROM CHAMBERS
vs.	)
	) [Re: Motions for Partial
ANCHORAGE SCHOOL	) Summary Judgment -
DISTRICT, ANCHORAGE	) Docket Nos. 200, 207, 212]
EDUCATION	)
ASSOCIATION, and	)
CHANCY CROFT, JOHN	)
PATTERSON, as individuals	)
Defendants.	)
	)

I. MOTIONS PRESENTED

Defendant Chancy Croft ("Croft") has filed three motions for partial summary judgment. At docket 200, Croft seeks summary adjudication of the issue of plaintiff Sherry McGinnis' ("McGinnis") entitlement to disability benefits under causes of action 9 and 11 of the Complaint.[1] At docket 207, Croft asks for partial summary judgment on cause of action 14 of the Complaint alleging that Croft and the Anchorage School District ("ASD") conspired to cause McGinnis damage. Finally, at docket 212, Croft

[1]At docket 208, the court granted Croft's motion at docket 200. However, as set forth at docket 226, the order at docket 208 has been vacated. The issues raised at docket 200 will be considered here.

moves for partial summary judgment to dismiss the remaining causes of action against him: the remainder of causes of action 9 (breach of contract) and 11 (negligence), 10 (intentional misrepresentation of fact), 12 (conversion), and 15 (negligent or intentional infliction of emotional distress. The motions are opposed. The parties have not request oral argument, and it would not be of material aid to the court.

II. STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if there is no genuine dispute as to material facts and if the moving party is entitled to judgment as a matter of law. The moving party has the burden of showing that there is no genuine dispute as to material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The moving party need not present evidence; it need only point out the lack of any genuine dispute as to material fact. Celotex, 477 U.S. at 323-325.

Once the moving party has met this burden, the non-moving party must set forth evidence of specific facts showing the existence of a genuine issue for trial. Id; Anderson v. Liberty Lobby,Inc., 477 U.S. 242, 248-9 (1986); Adickes, 398 U.S. at 160, n22. The non-moving party may not rest upon mere allegations or denials, but must show that there is sufficient material evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial. Anderson, 477 U.S. at 248. A "scintilla" of evidence is not enough to create a genuine issue of material fact. Anderson, 477 U.S. at 252. Nor do "mere allegations and speculation...create a factual dispute for purposes of summary judgment." Nelson v. Pima Community College, 83 F.3d 1075, 1081, 82 (9th Cir. 1996) (citing Witherow v. Paff, 52 F.3d 264, 266 (9th Cir. 1995)).

There is no genuine issue of material fact when the relevant

evidence in the record, taken as a whole, indicates that a reasonable fact-finder could not return a verdict for the non-moving party. Anderson, 477 U.S. at 248; Matsushita Elec. Induc. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

III. BACKGROUND

In January 1988, while working as a teacher at Dimond High School, McGinnis fell down and injured her back. In July 1988, McGinnis and Croft entered into a written contract for legal services. A few months later McGinnis had surgery on her back. Approximately one year later in October 1989, Croft obtained the opinion of McGinnis' surgeon, Dr. Mayfield, that the fall was a significant factor in McGinnis' need for treatment. As a result, ASD paid approximately $100,000 for workers' compensation benefits and reimbursement of medical expenses incurred due to McGinnis' on-the-job injury. In March 1990, Croft received payment of $11,000 in attorney's fees from ASD.

In October 1989, Croft filed a claim with the Alaska Workers' Compensation Board ("AWCB") for payment of other workers' compensation benefits, medical expenses, and interest due on the $100,000 previously withheld from McGinnis. On April 6, 1990, AWCB conducted a hearing and in June 1990 issued a decision denying McGinnis payment for additional workers' compensation benefits and interest. AWCB found a small portion of the medical expenses claimed compensable and denied payment for the rest. Croft appealed to the Alaska Superior Court. In October 1991, the Alaska Superior Court affirmed AWCB's decision denying payment for workers' compensation benefits and medical expenses, but reversed and remanded its decision denying interest.

Croft filed additional claims on McGinnis' behalf on April 27, 1990. However, an AWCB hearing scheduled for November 16, 1990, was continued until McGinnis provided an itemized list

to the Board and ASD's counsel of the additional expenses sought for reimbursement. On November 19, 1990, Croft sent McGinnis a letter withdrawing from her AWCB case, although he continued to represent her in the aforementioned appeal. McGinnis failed to furnish ASD counsel an itemized list, and the claim was dismissed in April 1991.

Finally, Croft filed one last claim before AWCB in June 1990 seeking still more workers' compensation benefits and attorney's fees. The pleadings do not reflect that a hearing was ever scheduled before AWCB.

McGinnis file suit against Croft and the other named defendants in August 1994.

IV. DISCUSSION

A. Cause of Action 9 - Breach of Contract

McGinnis' Complaint states in cause of action nine that she contracted with Croft for legal assistance to provide legal services to procure workers' compensation benefits for disability, to seek payment and reimbursement for medical expenses, and to pursue all actions or claims at law or in equity against ASD. Mcginnis alleges that Croft breached their contract by failing to perform his obligations and by withdrawing his legal representation on at least three occasions without just cause or prior notice causing prejudice to plaintiff's legal rights resulting in the loss of economic benefits she was entitled to receive pursuant to the Alaska Workers' Compensation Act ("Act").

1. Disability Benefits

In January 1988, when McGinnis was injured, Alaska compensation law was premised on the "earning capacity" concept. The Act defined "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or nay other employment." AS 23.30.265.10. However, after July 1, 1988, the Act was substantially revised

when Alaska adopted the "whole man" or impairment concept.[3] The earlier version of the Act under which McGinnis sought disability benefits compensated only for lost earnings or lost earning capacity and not for medical impairment. McGinnis asserts that she was entitled to other disability benefits such as permanent partial impairment.

The record establishes that McGinnis was paid disability benefits under the Act from January 7, 1988, the date of her injury, to May 8, 1990, when she was released by her physician to return to work as a school teacher. Since Mcginnis could return to the job she had at the time of her injury, she had no incapacity because of injury to earn the wages which she was receiving at the time of her injury in the same or any other employment. Therefore, under the applicable version of the Act, McGinnis was not entitled to any more disability benefits after May 8, 1990.

McGinnis admits numerous times that she could physically return to teaching after May 1990. In her Complaint she states:

> Plaintiff's physical disability was/is not completely debilitating and with minor accommodations, such as chair padding or cushions, Plaintiff was/is physically able to perform all necessary work related teaching duties.

She makes essentially the same statement in her depositions.

If McGinnis had been injured after July 1, 1988, she might have been entitled to some compensation for permanent partial impairment, however that is not the case. Under the old Act McGinnis was no longer entitled to disability benefits after May 1990. Therefore, Croft performed the contract with regard to

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[3]The 1988 amendments apply only to injuries sustained on or after July 1, 1988. Ch. 79, § 48, SLA 1988.

disability benefits.[3] Croft is entitled to summary judgment in this portio of the ninth cause of action.

2. Medical Expenses/ Interest / Penalty

In January 1990, ASD rescinded its initial controversion of McGinnis' claim and paid approximately $100,000 for workers' compensation benefits and to reimburse medical expenses. However, there were additional claims pending.

On April 6, 1990, AWCB conducted an all day hearing on McGinnis' claims for reimbursement of medical expenses which had accrued during the pending action to recover the $100,000 and for interest due on the money while withheld.[4] In June 1990, the AWCB issued a decision basically denying, with few minor exceptions, all of the medical expenses requested by McGinnis. The Board also denied interest on the previously paid medical expenses. Mcginnis appealed the decision to the Alaska Superior Court.

Before the Superior Court could render a decision, the Alaska Supreme Court decided Municipality of Anchorage v. Carter, 818 P.2d 661 (Alaska 1991). Both parties stipulated that Carter materially affected the Board's June 1990 decision and agreed to remand the case back to the AWCB. However, after a subsequent withdrawal of the Carter decision by the Sureme Court, the Superior Court vacated the stipulation and on October 14, 1991, affirmed the AWCB's decision regarding the medical expenses, but reversed and remanded the issue on the payment of

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[3]At docket 230, Croft moves or reconsideration of the court's order at docket 209 and asks for discovery sanctions. Because the court grants Croft's motion dismissing any claims for McGinnis for disability benefits, the motion at docket 230 is denied as moot.

[4] Croft contends that he did not believe McGinnis was entitled to a penalty and that she knew that no claim for a penalty would be advanced at the April 6, 1990, hearing. McGinnis maintains that she is entitled to a penalty. Therefore, there exist material issues of fact regarding McGinnis' entitlement to a penalty.

interest.

In a letter dated November 19, 1990, Croft informed McGinnis that he would no longer represent her before the AWCB, but would continue to handle the aforementioned appeal. Croft's withdrawal letter was sent after McGinnis failed to appear either in person or telephonically despite his having made accommodations for her for the November 16, 1990, AWCB hearing. The hearing had been scheduled because Croft had filed an application requesting payment of additional medical expenses not included in the previous hearing on April 6. Because of McGinnis' failure to appear at the hearing, Croft requested, and AWCB granted, a continuance. In addition, AWCB ordered that within fourteen days McGinnis serve upon the Board and ASD counsel an itemized list of the additional medial and transportation expenses sought. No list was served. Without complying with AWCB's order, McGinnis could not reschedule a hearing. On January 2, 1991, ASD filed a motion to dismiss. The motion went unopposed. After McGinnis failed to appear for the hearing on the motion to dismiss, the AWCB dismissed the application for additional medical expenses in April 1991.

McGinnis claims that Croft breached their contract by withdrawing his legal representation on at least three occasions without just cause or prior notice. As far as the court can tell, aside from Croft's withdrawal in November 1990, he made no other attempts to withdraw.[5] Mcginnis also claims that Croft would not return her files to her which prevented her from stopping a default ruling resulting in loss of monetary reimbursement to which she

---

[5] Croft did send two letters dated March 18, 1991, and April 4, 1991, to McGinnis expressing that, due to the stipulation entered into after Carter, her case had been remanded to AWCB which concluded his services in her workers' compensation claim. However, when Carter was withdrawn by the Alaska Supreme Court, Croft continued to represent McGinnis until the Alaska Superior Court's October 14, 1991, decision remanding her claim for interest to AWCB.

claims she was entitled under the Act. Croft claims that it was McGinnis' own failure to comply with AWCB's order to furnish an itemization of expenses that prevented her recovery.

Whether or not Croft breached the contract for legal services with respect to the recovery of the items discussed in this section of the order depends on whether his withdrawal was effective. The effectiveness of his withdrawal turns upon disputed facts. In his letter of November 19, 1990, Croft asserts that he talked to McGinnis' husband on the morning of the hearing with the intention of contracting McGinnis, who was in California attending law school, to discuss her case. In his affidavit Croft states that he withdrew from representing McGinnis because she refused to talk to him prior to the AWCB hearing on November 16; to furnish any information to him; and to attend the hearing despite his efforts to arrange for her to testify telephonically. On the other hand, in McGinnis' December 1990 letter she claims that she made an effort to contact Croft before the hearing and that his staff would not schedule an appointment. In her affidavit McGinnis states that she never gave her consent to Croft to withdraw as her attorney and that he had all the information necessary to pursue her claims before AWCB. Further, she testifies that Croft refused to provide her with her file upon request. The efficacy of Croft's withdrawal depends on genuine issues of material fact regarding whether Croft breached his contractual obligations to McGinnis to pursue the claims for additional medical expenses, interest, and a penalty.

B. Cause of Action 10 - Intentional Misrepresentation of Fact

McGinnis alleges in her Complaint that on or about April 4, 190, Croft informed McGinnis that ASD had agreed to pay approximately $100,000 and that she was entitled to additional moneys from ASD for reimbursement of medical expense, interest, and penalty. McGinnis claims that she believed Croft and relied upon his representations to her detriment in that she took no further

action to hire another attorney to secure payment for the aforementioned moneys. McGinnis claims that Croft intentionally misrepresented to her that he was pursuing all necessary actions on her behalf to seek to collect reimbursement for medical expenses, interest and penalty from ASD. McGinnis alleges that, although croft represented that he was pursuing actions on her behalf, he was in fact doing nothing and that he hid his secret intention to do nothing further on her behalf. In her affidavit, McGinnis states that Croft did not pursue to conclusion the claims he filed on her behalf.

The Alaska Supreme Court explained in Great Western Sav. Bank. v. George W. Easley Co., J.V., 778 P.2d 569, 580 n. 11 (Alaska 1989), citing Restatement (Second) of Torts § 525 (1977):

> One who fraudulently makes a misrepresentation of fact, opinion, intention of law for the purpose of inducing another to at or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.

The Restatement ((Second) of Torts § 526 provides:

> A misrepresentation is fraudulent if the maker
> (a) knows or believes that the matter is not as he represents it to be
> (b) does not have the confidence in the accuracy of his representation that he states or implies, or
> (c) knows that he does not have the basis for his representation that he states or implies.

In the case at bar, McGinnis offers no evidence that Croft knew or believed that on or about April 4, 1990, McGinnis would not be entitled to an additional recovery from ASD. In fact, the evidence supports the contrary. The record reflects that Croft: 1) represented McGinnis before AWCB on April 6, 1990, at an al day hearing; 2) filed, on April 27, 1990, a claim for additional recovery

against ASD; and 3) pursued McGinnis' appeal until a determination was made by the Alaska Superior Court in October 1991. Therefore, McGinnis' claims that Croft misrepresented any fact or intended to do nothing on her behalf after April 4, 1990, are meritless. Croft is entitled to summary judgment on the tenth cause of action.

C. Cause of Action 11 - Negligence

McGinnis asserts that the legal services contract executed by the parties created a duty imposed by law requiring Croft to exercise due care an skill as an attorney to protect McGinnis' legal rights and to act in a reasonable manner to initiate and prosecute any and all claims, causes of action, or remedies which existed pursuant to Alaska's laws in order to redress her injuries. McGinnis argues that had Croft exercised the proper care and skill, free from unannounced and unauthorized withdrawals of legal representation, then her claims would have been timely brought within the applicable statute of limitations.

To the extent that McGinnis is claiming that Croft failed to continue to represent her before AWCB following the November 16, 1990, hearing, McGinnis merely reiterates her breach of contract claim. Alternatively, if the court construes McGinnis' assertion to be that Croft failed to skillfully advocate her claims before AWCB, she has failed to produce the expert testimony necessary under Alaska law in a malpractice action to establish that the defendant violated accepted standards and that defendant's violation damaged plaintiff. Drake v. Wickwire, 795 P.2d 195-96 (Alaska 1990). Croft is entitled to summary judgment on this cause of action (but without prejudice to her breach of contract claim).

C. Cause of Action 12 - Conversion

McGinnis complains that Croft interfered with her right to possession, dominion, and control of $312.30 that she paid him for the purpose of obtaining a copy of the transcript of her workers'

compensation hearing and that Croft has refused to provide her with a copy of the transcript. Further, McGinnis alleges that she later demanded return of the $312.30 after discovering that Croft had withdrawn from representing her.

McGinnis wanted to appeal the Board's June 5, 1990, decision denying any additional medical benefits or interest and Croft agreed to handle her appeal provided that she pay for the filing fee and any transcript costs. croft argues that he advanced both the filing fee and the $312.30 for a copy of the transcript. The transcript was used to prepare McGinnis' appellate brief. Therefore, Croft asserts that the was entitled to be reimbursed.

The money in dispute wa used to reimburse Croft for a transcript he used to draft McGinnis' appellate briefs and argue her case. Thus, McGinnis' claims that Croft interfered with her right to possession and wrongfully dispossessed her of $312.30 are meritless. Croft is entitled to summary judgment on this cause of action.

D. Cause of Action 14 - Conspiracy

Cause of action 14 alleges Croft and ASD entered into an agreement requiring Croft to cease pursuing any action against ASD on behalf of McGinnis in exchange for the payment of attorney's fees. McGinnis bases her conspiracy claim on the assertion that after ASD paid Croft's attorneys fees on March 9, 1990, he took no further action on her behalf. while Alaska recognizes the tort of civil conspiracy, see Patterson v. State Dept. of Agriculture, 880 P.2d 1038, 1044 n.12 (Alaska 1994), cert. denied, ___ U.S. ___ 115 S. Ct. 936 (1995), the parties do not name, and the court is unable to find, an Alaska case setting out the elements of such a cuase of action. In Vieus v. East Bay Regional Park Dist., 906 F.2d 1330, 1343 (9th Cir. 1990), cert. denied, 498 U.S. 967 (1990), the Ninth Circuit explained:

> In order to prove a civil conspiracy, the parties to have conspired must have reached " a unity of

> purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." Transgo, Inc. v. Ajac Transmission Parts Corp., 78 F.2d 1001, 1020 (9th Cir. 1985) (citations omitted), cert. denied, 474 U.S. 1059, 106 C. Ct. 802, 88 L.Ed.2d 778 (1986). A civil conspiracy is a combination "of two or more persons who, by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage. Doleman v. Meiji Mut. Life Ins. Co., 727 F.2d 1480, 1482 n.3 (9th Cir. 1984) (citations omitted).

The court will use the definition in Vieus.

Croft contends that he was entitled to the $11,000 fee ASD paid to him on March 9, 1990, pursuant to AS 23.30.155, as a result of obtaining the payment of approximately $100,000 in benefits for McGinnis. Further, Croft informs the court that the $11,000 fee was approximately equal to the statutory minimum attorney's fee under AS 23.30.145 and that the written agreement entered into between ASD and Croft for the payment of fees was not a secret agreement since it was filed with the Alaska Workers Compensation Board. Additionally, Croft says that the continued to represent McGinnis after the March 9, 1990, payment. For example, Croft states that he met with McGinnis on March 21, 1990, prepared for a hearing scheduled for April 6, 1990, presented McGinnis' case at the all day hearing, filed an application to obtain additional benefits, filed an appeal from the Board's June 5, 1990, decision, obtained a second hearing date for November 16, 1990, filed two briefs and prepared for the second hearing and appeared at the Board hearing on November 16, 1990, only to find McGinnis not physically or telephonically present.

McGinnis offers no evidence of a conspiracy between Croft and ASD. She merely makes unsupported accusations. Based on the facts in the record, this court agrees with Croft that the fourteenth cause of action has no merit.

E. Cause of Action 15 - Negligent or Intentional Infliction of Emotional Distress

Croft contends that he is entitled to summary judgment on cause of action fifteen because McGinnis never suffered physical injuries. Alaska has adopted the general rule that where a tortfeasor's negligence causes emotional distress without physical injury damages may not be awarded. Hancock v. Northcutt, 808 P.2d 251, 257 (Alaska 1991). The recognized exception to the general rule where the plaintiff is shocked by observing the physical injury of a loved one has no application to the present case. In a case where the alleged emotional distress is not accompanied by physical injuries, Alaska law limits recovery to cases (1) where the emotional distress is "severe" (2) where the conduct of the tortfeasor is intentional or reckless, and (3) where such conduct is capable of being characterized as extreme or outrageous. Id. at 258 (citations omitted).

In her deposition, McGinnis testified that she suffers from headaches, irritability, nausea, and has trouble sleeping. She also states that she has not sought any help for these problems. McGinnis does not claim that the nature of these problems was serious enough to prevent her from returning to work as a teacher or to stop her from practicing law. Additionally, McGinnis fails to establish that the emotional distress she suffered was "severe," and she offers no proof that Croft's conduct was intentional or reckless nor capable of being characterized as extreme or outrageous.

In a motion for summary judgment the non-moving party may not rest upon mere allegations, but must show that there is sufficient material evidence supporting the claimed factual dispute.

Anderson, 477 U.S. at 248. McGinnis offers no such evidence. A reasonable fact-finder could not find that under Alaska law McGinnis has suffered from either negligent or intentional infliction of emotional distress.

V. CONCLUSION

For the foregoing reasons this court GRANTS the motions for partial summary judgment at dockets 200 and 207. the court GRANTS the motion for partial summary judgment at docket 212 on causes of action 10, 11, 12, 14, and 15, and DENIES summary judgment on cause of action 9 as to the additional medical expenses, interest, and penalty.

DATED at Anchorage Alaska, this 4th day of April 1997.

s/_____
JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

A94-0385–CV (JWS)

J. Josephson
L Croft
L Middleton (Middleton)
B. Owens (Jermain)
C. Stowers
S. Finley

Constitution of the United States
Amendment XIV

Section 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Alaska Statute
AS 14.20.180: *Procedure and hearing upon notice of dismissal or nonretention.*

(a) An employer shall include in a notification of dismissal of a teacher who has not acquired tenure rights, or of a nonretention or dismissal of a tenure teacher, a statement of cause and a complete bill of particulars.
(b) The tenure teacher may, within 15 days immediately following receipt of the notification, notify the employer in writing that a hearing before the school board is requested. The tenure teacher may require in the notification that the hearing be either public or private and that the hearing be under oath or affirmation. The notification may also require the right of cross-examination be provided and that the tenure teacher b e represented by counsel and have the right to subpoena a person who has made allegations which are used as a basis for the decision of the employer.
(c) Upon receipt of the notification requesting a hearing, the employer shall immediately arrange for a hearing, and shall notify

the tenure teacher or administrator in writing of the date, time, and place of the hearing. A written transcript, tape, or similar recording of the proceedings shall be kept. Transcribed copies shall be furnished to the tenure teacher for cost upon request of the tenure teacher. A final decision of the school board requires a majority vote of the membership. The vote shall be by roll call. The final decision shall be written and contain specific findings of fact and conclusions of law. A written notification of the decision shall be furnished to the tenure teacher within 10 days of the date of the decision.

Federal Rules of Appellate Procedure
Rule 38: *Damages and Costs for Frivolous Appeals.*

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

SHERRY L. MCGINNIS,)
Plaintiff,)
)
vs.)
)
ANCHORAGE SCHOOL)
DISTRICT,)
Defendant.)
)

Case No. 3AN-89-8657 CI

ORDER GRANTING SUMMARY JUDGMENT

The court has reviewed the parties' cross-motions for summary judgment and accompanying memoranda. The court finds there are no genuine issues of material fact and that judgment should be entered as a matter of law.

The undisputed facts are that plaintiff, while employed by defendant at Dimond High School, suffered a work-related injury on or about January 7, 1988. Plaintiff was unable to return to work until her treating physician gave her a full release to return effective May 8, 1990. During such time defendant attempted to require her to elect to either return to work, go on leave without pay, or terminate her employment. Plaintiff refused to make an election. Thereafter, defendant on April 5, 1989 terminated plaintiff.

On October 19, 1989, plaintiff filed the instant action. Defendant answered the complaint on November 8, 1989. In September, 1990 it became apparent that settlement could not be reached.

Defendant has contended, until its opposition and cross-

motion for summary judgment in 1992, that plaintiff had been terminated for failure to make an election either requesting leave without pay, returning to work, or terminating. In the alternative, defendant contended in its opposition and cross-motion that by failing to request leave without pay status, returning to work, or terminating, after May 9, 1990 she was terminated because of unauthorized and unapproved absence. This contention is without merit. The court concludes that defendant had improperly terminated plaintiff prior to May 8, 1990 and that plaintiff was not legally required to offer herself for work or leave without pay status. The questions had been joined as a result of her lawsuit which was answered by the District. Neither filing the answer, nor actions taken by the District thereafter can constitute notice of termination or an unconditional offer of reinstatement of the plaintiff who had been previously terminated improperly.

IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is hereby GRANTED and plaintiff shall be immediately offered reinstatement with no break in service.

Defendant's cross-motion for summary judgment is DENIED.

DATED at Anchorage, Alaska this 16 day of June, 1992.

s/_____
KARL S. JOHNSTONE
Superior Court Judge

(note: original bears logo and letterhead stylization of the school district)

ANCHORAGE
SCHOOL DISTRICT
4600 DeBarr Avenue
P.O. Box 196614
Anchorage, Alaska 99519-6614
Area Code (907) 333-9561

CERTIFIED MAIL

August 31, 1992

Sherry L. McGinnis
Suite 320
220 west 34th Avenue
Anchorage, Alaska 99503

Dear Ms. McGinnis,

This letter is to inform you that your employment with the Anchorage School District has been terminated for unauthorized absences.

It was reported that you arrived at your assignment at West High School on Tuesday morning, August 25, told the principal you would not work without a signed contract, and you were directed to go to the Personnel Department to take care of the matter.

You have neither come to the Personnel Department nor returned to your assigned location at West High School. Further, you have not contacted any District official during that period of time. Efforts to contact you have been futile since you have provided no phone number at which you can be reached. Your conduct in this matter has been clearly unprofessional.

You have now been absent from work for five days without

authorization; consequently, in accordance with Alaska Statutes Sec. 14.20.170a.(3) and School Board policy 537.61, you have been terminated. A copy of these provisions is attached.

You may request a hearing before the School Board concerning your termination, if within 15 days after receipt of this notification, you submit a written request for the hearing according to the procedure which is explained in the attachment to this letter.

Sincerely,

s/
J. Edward Lindquist
Executive Director, Personnel

cc Mark Jones, Anchorage education Association
John Patterson, Attorney, Anchorage Education Association
Brad Owens, Attorney, Anchorage School district
John Alexander, Director, Contract Administration
Lance Bowie, Principal, West High School
Bill Mell, Executive Director, secondary education

Attachments: School Board Policy 537.61 and AS 14.20.170 and 14.20.180

Appendix I

RECEIVED
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHERRY McGINNIS,	) Docket Nos.:	97-35638
Plaintiff and Appellant,	)	97-35829
	)	97-36030
v.	)	98-35297
	)	
ANCHORAGE SCHOOL	) Consolidated	
DISTRICT, ANCHORAGE	)	
EDUCATION	)	
ASSOCIATION, and	)	
CHANCEY CROFT and	) U.S. District Court Docket No.:	
JOHN PATTERSON as	) CV-94-00385-JWS	
individuals	)	
Defendants and	)	
Appellees.	)	
	)	

RESPONSE TO THE PANEL'S ORDER
FILED JANUARY 27, 1999

Paul Grinvalsky
Attorney for Appellant
4978 Niagara Avenue, Suite 36
San Diego, CA 92107
(619) 221-8227
Attorney for Plaintiff/Appellant

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told her she should contact Cecelia Lobdell in the Personnel office to check on the status or whereabouts of her contract; however, she did not do so, at least as far as I know, while she was in my office.

7) We also talked about other things while we were discussing the whereabouts of her contract, such as her books and class materials and the schedule for classes and in-service. She accused me of failing to keep my promise to send her this information; I tried to explain to her that I was unable to contact the Language Arts Department chair and get the material she requested, but I attempted to take responsibility for the oversight and apologized to her. She remained insistent that I had not kept my word to her to get these materials to her and I kept trying to apologize and get her to understand it was an oversight.

8) Eventually, when we were not able to locate her contract at West, I suggested that she go to the Personnel office to see if it was there, since that is where the teacher contracts are normally kept. She indicated that she intended to leave West, I thought to go to personnel to see about her contract; I suggested to her that she might want to first come to the teacher's meeting which had just begun so that I could introduce her to her colleagues. However, she refused my invitation and left West with the man who had accompanied her.

9) I never again saw or spoke with McGinnis after she left West High School on the morning of August 25, 1992. After a day or two, I contacted Secondary Education to obtain a substitute to prepare for and cover McGinnis' 10th grade English classes, since students were returning to school the next week. When McGinnis did not

return at all, I understand she was terminated and I filled her position with a permanent replacement.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED: 12/13/96

s/_____
Lance Bowie

SUBSCRIBED AND SWORN to before me this 13 day of December, 1996.

s/_____
Notary Public in and for Alaska

My Commission Expires 10/12/99

Contents of Stamp:
Regina R. Butler
Notary Public
State of Alaska
My Commission Expires October 12, 1999

17. At no time after I withdrew in November, 1990 did I ever tell Ms. McGinnis that I would pursue any further claim for her with the Board. I did seek attorney fees at the Board in late 1991 but abandoned that effort after the adjuster calculated the amount of interest to be no more than $27. At no time did Charles Coe ever contact me about Mc. McGinnis' workers' compensation claim. I knew in the fall of 1991 that the appeal Coe filed for McGinnis had been dismissed. To me this was further evidence she had abandoned her claim.

Dated at Anchorage, Alaska this 20th day of December, 1996.

CHANCY CROFT LAW OFFICE

s/_____
CHANCY CROFT
ABA # 6404010

SWORN AND SUBSCRIBED to before me this 20th day of December, 1996.

(no notary stamp and signature not legible)

s/_____
Notary Public for the State of AK

Commission Expires: 12/4/98

Supreme Court, U.S.
FILED
JUN 9 1999
CLERK

(2)

No. 98-1810

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998

SHERRY L. McGINNIS, *Petitioner*
v.
ANCHORAGE SCHOOL DISTRICT, *Respondent*

SHERRY L. McGINNIS, *Petitioner*
v.
ANCHORAGE EDUCATION ASSOCIATION, *Respondent*

SHERRY L. McGINNIS, *Petitioner*
v.
JOHN PATTERSON, *Respondent*

SHERRY L. McGINNIS, *Petitioner*
v.
CHANCY CROFT, *Respondent*

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT, CHANCY CROFT'S BRIEF IN OPPOSITION

Chancy Croft, Counsel *Pro se*
Chancy Croft Law Office
738 H Street
Anchorage, AK 99501
TEL: (907) 272-3508
FAX: (907) 274-0146

1998

QUESTION PRESENTED FOR REVIEW

As to one Respondent the question for the court to consider is this:

1. Should this court grant certiorari when (a) four of the six causes of action (c/a) Petitioner Sherry L. McGinnis (McGinnis) alleged against Respondent Chancy Croft (Croft) were dismissed by the trial court without opposition by McGinnis, (b) dismissal of the fifth cause was not argued by McGinnis on appeal and (c) McGinnis dismissed the sixth cause with prejudice approximately two months before trial?

Statement of Case

McGinnis sued Croft and three others for $60,000,000 (Sixty Million Dollars). (Appendix A) In cause of action 15 of her 29 page complaint McGinnis alleged that all four respondents had inflicted severe emotional and physical distress upon her. At her June 1995 deposition, McGinnis claimed that the severe physical and emotional distress had caused her to have headaches, irritability, nausea and sleeping problems. (Appendix B)

Upon cross examination she admitted that since 1991 she had not been diagnosed with any of these conditions and when asked if a "physician, physician's assistant, chiropractor, osteopath, naturopath, your own personal television psychic, a healer, a counselor, a social worker, person of any type" had treated her for any of these four conditions between 1991 and 1995 she replied simply "I have seen no one." (Appendix C)

A conspiracy by Croft with the Anchorage School District to inflict severe emotional stress on McGinnis was 1 of 6 causes of action McGinnis alleged against Croft in August of 1994. She first alleged breach of contract (c/a 9), added intentional misrepresentation of fact (c/a 10), claimed negligence (c/a 11), plead conversion (c/a 12) followed with conspiracy (c/a 14) and ended

with intentional infliction of severe emotional and physical distress (c/a 15).

By November of 1997 all six causes of action had been dismissed. Five were dismissed by Judge John W. Sedwick on Croft's motion for summary judgment. As to four of those five - intentional misrepresentation of fact (c/a 10), negligence (c/a 11), conspiracy (c/a 14) and intentional infliction of severe emotional and physical distress (c/a 15), McGinnis did not oppose Croft's motion for summary judgment. That's correct! McGinnis is now asking this court to grant a petition of certiorari over four items she did not even argue in the trial court. You don't have to take my word on it. We have the solemn declaration of her attorney at the time, Steven Finley. McGinnis' trial attorney solemnly declared that McGinnis did not oppose Croft's motion for summary judgment on her claims of (1) intentional misrepresentation (c/a 10), (2) conspiracy (c/a 13) and infliction of emotional distress (c/a 15). (Appendix D)

The fourth claim, the one for negligence (c/a 11) was not opposed even though Finley's declaration did not admit as much. But the response he filed to Croft's motion for summary judgment contained an express statement that no opposition to the dismissal was being filed. Strangely and inexplicably but none the less clearly, McGinnis' opposition said "Plaintiff's proof of

Croft's negligence and conspiracy with ASD are reserved for trial, but are not at issue here for purposes of Plaintiff's summary adjudication motion." (Appendix E)

The fifth claim - conversion (c/a 12) - was abandoned on appeal when McGinnis did not brief or argue it at all. (Appendix F)

The sixth and last claim, breach of contract, involved the same damages - reimbursement of medical expenses, compensation and disability benefits, penalty and interest - as McGinnis had sought under her claim of negligence against Croft. This claim - the breach of contract - the District Court refused to dismiss on summary judgment. It was set for trial to commence on January 5, 1998 in Anchorage, Alaska. The trial never happened. Instead of going to trial, McGinnis voluntarily stipulated to dismiss all her remaining claims against Croft in late October 1997. This stipulation for dismissal was with prejudice. (Appendix G)

ARGUMENT

In her 14 page petition McGinnis does not mention Croft by name at all. There are two references that indubitably refer to him without mentioning his name.

Overtly or covertly, McGinnis' petition involves Croft even though it primarily is addressed to her claim against the Anchorage School District. However, at no point in her petition does McGinnis

admit, address or argue that it was her own action that brought her case to conclusion. She does not advance any reason why she did not oppose Croft's motions for summary judgment, why she did not argue the fifth point on appeal or why she now wants this court to grant a petition for certiorari when she voluntarily stipulated to dismiss the remaining cause of action. Voluntary dismissal, Parks School of Business, Inc. v. Symington, 51 F.3d 1480 (9th Cir. 1995), like an attempt to argue the first time on appeal, Hunt v. Pan America Energy, 540 F.2d 894 (8th Cir. 1976), precludes appellate review.

CONCLUSION

Croft denies that there was or is any validity to any of McGinnis' claims. For purposes of her petition, McGinnis' actions themselves were sufficient reasons alone for the court of appeals to have affirmed the trial court. She did not acknowledge or address in her petition her lack of opposition, her abandonment or her stipulation to dismiss with prejudice. There is no reason advanced by McGinnis for this court to undo what she has done to herself.

Dated June 7, 1999

Respectfully submitted,

Chancy Croft, Counsel *Pro se*
738 H Street
Anchorage, AK 99501
TEL: (907) 272-3508

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE JUDICIAL DISTRICT OF ALASKA

SHERRY L. MCGINNIS	) Case No. A94-) 0185CV (JWS)
Plaintiff,	)
ANCHORAGE SCHOOL DISTRICT, ANCHORAGE EDUCATION ASSOCIATION, and CHANCY CROFT and JOHN PATTERSON as individuals	) PLAINTIFF'S) INITIAL) DISCLOSURES)) (Fed.R.Civ.) P. Rule 26)
Defendants.	)

PRELIMINARY STATEMENT

Plaintiff, Sherry L. McGinnis, hereby discloses the following information in compliance with Fed.R.Civ.P., Rule 26. Plaintiff has not fully completed an investigation of the facts relative to this case and the following disclosures are made without prejudice to Plaintiff's right to disclose subsequently discovered facts. The disclosures herein are made in a good faith effort to supply such factual information that is presently known to Plaintiff. Plaintiff expressly reserves the right to all litigation and evidentiary privileges including, but not limited to, attorney-client, physician-patient, and spousal communication, and the applicable privilege is not waived by virtue of this mandatory disclosure.

A. The following individuals are likely to have discoverable information concerning the identified subjects and relevant to disputed facts

alleged with particularity in the Complaint. Addresses and telephone numbers are provided to the extent know to Plaintiff.

Interest through 8/25/94 @ 10.5% on late payment by ASD of $114,817.17 for medical expenses incurred and pursuant to Alaska Workers' Compensation Act and Alaska Statutes (Remanded to AWCB by the Superior Court in case #3AN-90-4827 Civil, abandoned by Chancy Croft) 28,875.72

Penalty through 8/25/94 @20.0% on late payment by ASD of $114,813.17 for medical expenses incurred and pursuant to Alaska Workers' Compensation Act and Alaska Statutes (Abandoned by Chancy Croft) 22,962.63

CONTRACT (BACK-PAY) AND TORT DAMAGES SOUGHT IN THE COMPLAINT IN THE STATE ACTION AGAINST ANCHORAGE SCHOOL DISTRICT BUT ABANDONED BY JOHN PATTERSON AND ANCHORAGE EDUCATION ASSOCIATION

Back Pay for:
School Years 1989-1992 @33,800 ('88 - '89 contract) $101,400.00

Tort damages for wrongful discharge:
Prayer of 1988 Complaint seeks amount not less than: 35,000.00

CONTRACT DAMAGES FROM ANCHORAGE SCHOOL DISTRICT'S WRONGFUL TERMINATION IN 1992

Back pay after 1992 termination by Anchorage District at Ph.D. salary level published by Anchorage School District in August, 1992:

School Year:	1992-1993	$ 48,821.00
	1993-1994	48,821.00+
	1994-	(unknown)

PAIN AND SUFFERING

Severe physical and emotional stress and distress $10,000,000.00

PUNITIVE DAMAGES AGAINST ALL DEFENDANTS $50,000,000.00

VALUE OF TENURE BENEFITS, INCLUDING BUT NOT LIMITED TO, HEALTH CARE COVERAGE, PENSION BENEFITS, AND TAX DEFERRED RETIREMENT BENEFITS (value unknown)

INTEREST ON ALL AMOUNTS AT THE MAXIMUM LAWFUL PERCENTAGE RATE (value unknown)

ATTORNEYS' FEES AND COSTS AS PROVIDED BY LAW (value unknown)

Q But you do recall that you alleged in the complaint that the defendants inflicted upon you severe emotional distress?
A That's correct.
Q Okay. And is that the time of $10 million that you were referring to in the -- the preliminary statement.
A I would say it probably is, yes.
Q Okay. If you will, describe for me all of the physical or emotional distresses that you had; the factual basis for your complaint that you've suffered severe emotional physical and emotional stress or distress.
A Are you asking for physical manifestations?
Q Yes.
A Those were presented yesterday. That's already been asked.
Q And -- and the emotional?
A I believe that was all answered yesterday.
Q And what was answered was headaches, is that correct?
A Yes, headaches was one thing I mentioned.
Q Irritability, is that correct?
A Yes.
Q Nausea?
A Yes.
Q And sleeping problems. Is that correct?
A Difficulty sleeping, yes.
Q And -- and those were the only four things you mentioned, isn't that correct?
A I don't recall if those were the only four or not.
Q Okay. What others are there?
A I -- I -- I can't think of others right offhand.
Q Okay. So -- so all you can think of now is headaches, irritability, nausea and trouble sleeping? Am I correct?

THE REPORTER: I'm sorry, I ... (indiscernible)
MR. CROFT: I don't think she's answered yet.

A Those are the disturbances I can think of at this time. yes

Q When did the headaches first begin?

A I don't recall.

Q Well, when did the irritability first begin?

A I don't recall exactly. I would, as I recall, probably some time in 1989.

Q When did the nausea begin?

A I would say about the same time.

Q And the sleeping problems?

A Also in 1989 I would say.

Q How often do you have headaches?

Q And you believe that all four of those conditions: headaches, irritability, nausea and problems sleeping are due to the actions of the four defendants that you named in the complaint?

A I do, yes.

Q And are there any other substantial factors in your having headaches besides the action of the four defendants in your condition?

A I don't believe so, no.

Q Any other substantial factors in your having irritability other than the actions of the four defendants?

A I don't believe so.

Q Any other substantial factors due to your having nausea besides the action of the four defendants?

A I don't believe so.

Q And any other substantial factor in your having sleeping problems other than the action of the four defendants?

A I don't believe so.

Q Now, have you seen for any type of treatment for headaches, irritability, nausea or sleeping problems in 1995?

A I've seen no -- no physicians.

Q No, I didn't say physicians. I said -- I didn't mean to if I did so let me correct it. I meant who have you seen for treatment whether it's a physician, physician's assistant, chiropractor, osteopath, naturopath, your own personal television psychic, a healer, a counselor, a social worker, person of any type for any of the problems in order to obtain relief from them during 1995?

A I have seen no one.

Q And the same question, who have you seen to obtain relief from these problems in 1994?
A I have not seen anyone.
Q And the question regarding 1993?
A I have not seen anyone.
Q And the same question regarding 1992?
A I have -- I have not seen anyone.
Q 1991?
A I don't believe I saw anyone that year as well.
Q In 1990?
A In 1990, I believe I was being treated ...
Q By?
A by doctors and psychotherapists both at that point.
Q What doctor was treating you for headaches in 1990?
A I believe my doctor was -- I don't remember her name but it will be part of your records, Mr. Croft.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE JUDICIAL DISTRICT OF ALASKA

SHERRY L. MCGINNIS	) Case No. A94-
	) 385CV (JWS)
Plaintiff,	)
	) DECLARATION OF
ANCHORAGE SCHOOL DISTRICT)	STEVEN C. FINLEY
ANCHORAGE EDUCATION	) IN SUPPORT OF
ASSOCIATION,	) OPPOSITION TO
and CHANCY CROFT and	) DEFENDANT
JOHN PATTERSON as	) CROFT'S MOTION
individuals	) FOR RULE 11
	) SANCTIONS
Defendants.	)
	)

I, Steven C. Finley, declare as follows:

1. I have been attorney of record in this action for plaintiff since July 1, 1996.

2. Prior to agreeing to represent the plaintiff in this action, I spent 17 hours in May and June of 1996, interviewing plaintiff in person and on telephone with respect to the allegations made in her complaint on file, I reviewed the complaint, plaintiff's initial disclosure made pursuant to Federal Rule of Civil Procedure 26 and the accompanying documents filed with the court, consisting of two boxes of copies of evidentiary materials pertaining to plaintiff's claims.

3. At the time of these discussions with plaintiff, she indicated to me that her present attorney Judith Oakes was insufficiently experienced to take the case to trial and that she sought more experienced counsel.

4. At the time of our discussions, plaintiff provided to me a detailed recollection of the

substance of her deposition which had been taken in 1995. At that time she had not as yet ordered a copy of her deposition. I immediately arranged for a copy of the deposition to be ordered and once all three volumes were received, I completed my review of the deposition transcript by August 26, 1996.

5. After receiving the court's order of July 5, 1996 ruling on defendant's motions for summary judgment and motion to dismiss, and reopening discovery for a limited period, I believed that the remaining issues in the litigation were now well defined and proceeded to conduct and participate in discovery, including the continued deposition of plaintiff by telephone in Hobbs, New Mexico, the depositions of witnesses William McGinnis and Terry Baty which took place, again by telephone, in Anchorage, Alaska and Las Vegas, Nevada, and serving written discovery requests upon defendants Croft and ASD.

6. Upon receipt and review of defendant Croft's motions for summary judgment in December 1996, I made no attempt to oppose the motions in regard to plaintiff's causes of action for conspiracy or intentional misrepresentation, or in regard to infliction of emotional distress, other than to state that the discovery sanction in favor of defendant ASD (prohibiting plaintiff from introducing damages as to emotional distress) should not operate to similarly bar plaintiff from introducing such evidence against defendant Croft.

7. I have never received any demand, formal or informal, from defendant Croft requesting that any pleading or part of any pleading be withdrawn or corrected on the basis that it is frivolous or otherwise; nor have I ever received any advance notice from defendant Croft of his intention to file a Rule 11 motion.

8. The arguments made and evidence introduced in opposition to Croft's motions for summary judgment were not presented for any improper purpose, were based upon legal research conducted, and discovery and investigation of the case and were not frivolous.

9. After receiving the court's ruling on defendant Croft's motions for summary judgment, and after being unable to settle the remaining claims with defendant Croft, both plaintiff and I determined that the amount of monies involved in the remaining claims rendered them uneconomic and impractical to proceed to trial.

10. Accordingly, plaintiff ordered, and Croft accepted, a stipulation to dismiss these claims with prejudice, but without prejudice to plaintiff's right to appeal the court, grant of summary judgment in favor of defendant Croft or to introduce admissible evidence of the facts underling the reaming claims being dismissed.

11. I have expended 19.1 hours in reviewing, researching and responding to defendant Croft's motion for Rule 11 Sanctions. My usual hourly billing rate is $200.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is within my personal knowledge and is true and correct. Executed at San Francisco, California this 26th day of February, 1998.

s/_____
Steven C. Finley

Alaska substantive law allows proof of breach of ethical obligations to be used as evidence of an attorneys negligence in a subsequent malpractice action. However, the issue now before the Court is much simpler. [73]

---

73 Plaintiff's proof of Croft's negligence and conspiracy with ASD are reserved for trial, but are not at issue here for purposes of Plaintiff's summary adjudication motion.

Introduction

McGinnis' brief only addresses the issues of Negligence (A through C), Breach of Contract (D and E), Conspiracy (F), (G) Emotional Distress and Misrepresentation (H). All other issues are deemed waived. Of the 5 issues argued by McGinnis in this appeal 4 - negligence, conspiracy, emotional distress and misrepresentation - were the subject of summary judgment motions by Croft which McGinnis did not oppose in the trial court. The fifth - breach of contract - was voluntarily dismissed by McGinnis on October 27, 1997.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ALASKA

Case No.: A94-385 CIV (JWS)

Stipulation to Dismiss With Prejudice the Remaining Claims Against Chancy Croft

Plaintiff, Sherry McGinnis (McGinnis), through her attorneys, Finley and Deaton, and Defendant Chancy Croft (Croft), stipulate to the dismissal with prejudice of the remaining claims against Croft pursuant to the following terms:

1. By Order dated April 4, 1997 the Court, at page 11, granted partial summary judgment in favor of Croft as to all claims asserted by McGinnis in her complaint against him with the exception of "cause of action 9 as to the additional medical expenses, interest and penalty." These "remaining claims" of cause of action 9 are the subject of this stipulation:

2. McGinnis agrees to dismiss with prejudice the "remaining claims" of cause of action 9 and agrees that she is forever barred from relitigating these "remaining claims" should any of her other claims that were dismissed by the Order dated April 4th 1997 be reversed on appeal and remanded for trial.

3. McGinnis and Croft agree that this stipulation to dismiss with prejudice the "remaining claims" shall in no way prejudice McGinnis' right to appeal the Court's granting of summary judgment in favor of Croft by the Order dated April 4, 1997 and, in the event of reversal, shall in no way prejudice or prevent McGinnis from introducing admissible evidence of the facts underlying the "remaining claims" but McGinnis

may not seek any recovery on those "remaining claims".

4. McGinnis and Croft agree that this stipulation to dismiss the remaining claims shall in no way prejudice whatever right Croft has to move for and obtain an award of costs and attorney's fees.

DATED this 29th day of October, 1997 at Anchorage, Alaska.

CHANCY CROFT LAW OFFICE

s/_____
CHANCY CROFT
ABA 6404010

DATED this 27 day of October, 1997 at San Francisco, California.
FINLEY & DEATON
Attorneys for Plaintiff

s/_____
STEVEN FINLEY

Supreme Court, U.S.
FILED
JUN 14 1999
CLERK

(3)

No. 98-1810

IN THE

Supreme Court of the United States

SHERRY L. McGINNIS,

Petitioner,

v.

ANCHORAGE SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ANCHORAGE SCHOOL DISTRICT

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2 cc

QUESTIONS PRESENTED FOR REVIEW

Respondent Anchorage School District (hereinafter "District") disagrees with Petitioner that any questions of national importance are presented for review in this petition since the decision issued by the Court of Appeals for the Ninth Circuit in this case was a Memorandum Decision. Under Ninth Circuit Rule 36-3, disposition of an appeal through a Memorandum decision means the case is not appropriate for publication and may not be cited to or by the courts of the Ninth Circuit except as provided under that Rule. Therefore, the Memorandum decision issued by the Court of Appeals in this appeal is of no precedence within the Ninth Circuit and has even less consequence nationally.[1]

To the extent Petitioner has raised any questions worthy of response, the questions must be presented as follows: Is due process under the Fourteenth Amendment violated when (a) a tenured teacher ignores the direction of her principal to obtain her contract at the District personnel office (and leaves the school, thereby abandoning her position); (b) ignores the advice of her counsel that she has been reinstated to a teaching position; (c) ignores the advice and admonitions of her counsel and bargaining representative that she must return to school or risk termination; and (d) ignores the advice and admonitions of her counsel and bargaining representative that she must request a hearing within fifteen days after receiving her notice of termination in order to protect her tenured employment? May this

1. See Appendix A, p. 2 to Petition for Writ of Certiorari. See also Appendix B, p. 6a where the panel voted to deny the petition for rehearing and to reject suggestion for rehearing en banc, since no judge of the full court requested a vote on the petition.

teacher then wait one year and 364 days before coming forward to complain about her reinstatement and termination through the filing of a lawsuit in federal court alleging, in fifteen separate causes of action, that she is entitled to recover $60,000,000 claiming she was improperly terminated two years earlier? May this teacher then fail and refuse to comply with discovery and fail to adequately respond to motions for summary judgment by offering sufficient competent evidence that would establish any genuine issue of material fact for trial? May this teacher then raise frivolous issues on appeal and rely simply on the same conjecture and supposition contained in the mere allegations in her unverified complaint, as she did before the District Court? May this teacher finally claim that the Court of Appeals failed to apply the proper criteria or standard when she loses her appeal and then question the integrity and honor of the members of the appeal panel? The only answer to these questions is, unequivocally, NO.

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Appendix A — Relevant Statutes 1a

STATEMENT OF THE CASE[2]

Petitioner Sherry L. McGinnis (hereinafter "McGinnis") was employed initially by the District as a teacher in August 1981. She taught English and language arts at Dimond High School in Anchorage, Alaska. In January 1988, she allegedly slipped on some lettuce on the hallway floor at school and injured her back. Between January 1988 and May 1990, McGinnis was out of school on workers' compensation; in May 1990, her treating doctor released her to return to work without restriction.

However, rather than return to work, McGinnis elected to go to law school in San Diego, California. App. E, p. 16a. She attended law school for two years and graduated in August 1992. However, prior to her enrollment in law school, the District requested that she either return to work as a teacher or request leave without pay, once her workers' compensation benefits ended; when she refused, she was terminated in April 1989. App. E, p. 15a. Thereafter, through her teachers union, she obtained the services and representation of John Patterson, an attorney in Anchorage, Alaska, who filed a lawsuit in her behalf in state court challenging the termination. *Id.*

In June 1992, the state court granted summary judgment in favor of McGinnis and ordered that she "shall be immediately offered reinstatement with no break in service." App. G, p. 61a. The state court made no award of damages

2. The facts provided in this Statement of the Case are taken largely from the Statement of Facts determined by the district court from the record in its various rulings of the summary judgment motions. These rulings are provided as part of the Petition for Writ of Certiorari in Appendix E at pp. 15a-20a, 38a-43a and 46a-47a.

to McGinnis and she made no request for clarification or reconsideration of damages arising from her termination. Within days of this order, the District sent to McGinnis a letter offering her immediate reinstatement as a teacher. App. E, p. 40a. Shortly thereafter, she began communicating directly with the District about her reinstatement and her teaching position when she returned. App. E, p. 17a. A position was allocated for her at West High School in Anchorage as an English teacher. The principal at the school called to advise her of the position and welcome her as a new staff member.

In August 1992, McGinnis traveled to Anchorage to assume her teaching position at West High School. She was advised that a contract would be available for her at the school when she arrived the first day for teachers' in-service training. App. E, p. 17a. The District personnel office prepared a standard teacher's contract for McGinnis, but it was not sent to West High School. App. E, p. 41a. When she arrived at the school on August 25 early in the morning, she introduced herself to the principal and asked where her contract was. He told her he had not seen it and asked his secretary to look for it. When it was not found at the school, the principal directed her to go to the District personnel office to obtain the contract. App. E, p. 17a. However, McGinnis refused to remain at the school without the contract and left within 20 minutes after arriving; she never returned to the school nor did she go to the personnel office to obtain her contract. *Id.*

McGinnis left the school and went to the law offices of Mr. Patterson, the attorney who had obtained the order for her reinstatement in state court. He advised her that she had an enforceable contract with the District as a result of

the state court order, even if no contract was waiting for her at the school when she arrived, as she had expected. App. E, p. 18a. Mr. Patterson advised her that she must go back to the school and not abandon her position. *Id.* A few days later, Mr. Patterson advised McGinnis that it was his understanding there was a written contract for her and she must return to work as soon as possible. *Id.* McGinnis did not follow his advice; she never contacted anyone at the District about her contract, which was in the personnel office. *Id.*

After she had been absent without authorization or excuse for five days, the Executive Director of Personnel for the District wrote McGinnis a letter advising her that her employment with the District had been terminated. *Id.* In this letter dated August 31, 1992, McGinnis was advised that she "may request a hearing before the School Board concerning her termination, if within 15 days after receipt of this notification, you submit a written request for the hearing according to the procedure which is explained in the attachment to this letter." App. E, pp. 18a-19a. Attached to the letter were copies of Alaska Statute 14.20.170(a)(3) and Board Policy 537.61, which explained these rights and procedures. *Id.*

McGinnis did not request a hearing, despite receiving advice from Mr. Patterson and Mark Jones, her bargaining representative, that she must do so to protect her tenured employment as a teacher, if she wished to challenge her notice of termination. App. E, pp. 19a and 20a. Instead, McGinnis spent several weeks traveling around Alaska with her boyfriend and settling her pending divorce action against her former husband who still lived in Anchorage. McGinnis then returned to California where she studied for and took

the California bar exam in February 1993. After passing the bar exam, McGinnis practiced law in California. She was hired and fired by a company in San Diego, which she sued in California State court for wrongful termination. McGinnis was represented in that wrongful termination action by the same boyfriend who traveled to Alaska in August 1992 and toured Alaska with her after she abandoned her position at West High School.

McGinnis did not request a hearing before the School Board within 15 days after her receipt of the notice of termination; instead she filed this lawsuit in federal district court in Anchorage in August 1994, one day shy of exactly two years after she arrived at West High School and walked away, abandoning her teaching position. App. E, p. 38a. After almost three years of litigation and repeated refusal by McGinnis to comply with discovery orders, the district court granted summary judgment in favor of the District and dismissed all remaining claims in the lawsuit against the District. The district court granted summary judgment to the District because "A reasonable fact-finder could not return a verdict in favor of McGinnis based on these undisputed facts . . . [the] scintilla of evidence [offered by McGinnis] will not support a finding that the contract was not in fact being offered to her in the customary channel at the District Personnel Office." App. E, pp. 41a-42a. The district court relied on the evidence that McGinnis repeatedly acted against the advice and direction given by Mr. Patterson, her attorney, and Mr. Jones, her union representative, when she failed to contact the personnel office, after being advised that a contract was prepared for her, and also failed to heed their advice and counsel to request a hearing before the School Board, after receiving the August 31 notice of termination letter from the District. *Id.*

REASONS FOR DENYING THE WRIT

I.

McGINNIS WAS AFFORDED DUE PROCESS PROTECTIONS.

Alaska has long applied due process to protect the property rights of public employees, such as tenured teachers, in circumstances where they have been notified of termination from employment. This protection is explained by the Alaska Supreme Court in its decision in the case of *Kenai Peninsula Borough Board of Education v. Brown*, 691 P.2d 1034, 1036-7 (Alaska 1984), a case that was cited by the district court:

> A tenured teacher's due process rights prior to dismissal are set forth in AS 14.20.180. The Board must notify the teacher of the dismissal and provide "a statement of cause and a complete bill of particulars." The teacher may then request a public or private hearing and other rights, such as representation by counsel and cross-examination, are granted during the hearing. This hearing is to be held prior to an effective dismissal. A pre-termination hearing is consistent with due process and AS 14.20.180.

The Court of Appeals also cited to this case and relied upon it in affirming the judgment:

> Assuming that McGinnis had a contract despite her refusal to go to the personnel office and conclude a contract, Alaska law and the

> School District provided McGinnis with the pre-termination right to a hearing, because "termination is not effective until at least fifteen days following the notification of dismissal. If the teacher does not request a hearing, the dismissal becomes effective immediately following the expiration of the fifteen day period." *Kenai Peninsula Borough Bd. of Educ. v. Brown*, 691 P.2d 1034, 1037 (Alaska 1984).
>
> McGinnis was notified of her right to this hearing concerning her termination but failed to respond or take advantage of the hearing opportunity. She recognized in her argument against prescriptive bar of the action that she was not officially terminated until 15 days after the termination notice.

App. B, p. 12a. Thus, it is the *opportunity* for a pre-termination hearing that is the touchstone of the due process protections. Under Alaska laws pertaining to tenured teachers, it is not until *after* the fifteen days, during which that opportunity exists and may be exercised, have expired that the termination became *effective*. *See City of North Pole v. Zabek*, 934 P.2d 1292, 1297 (Alaska 1997) (which discusses both federal and state due process protections requiring an opportunity for a hearing before deprivation of the property interest in public employment). It is indeed peculiar that the only person who can't seem to grasp the meaning of this case is McGinnis, a former teacher and a lawyer.

II.

THE CORRECT STANDARD WAS APPLIED BY THE COURT OF APPEALS.

The Court of Appeals affirmed the judgment of the district court by adopting the reasons stated by the district court in its orders granting summary judgment. The Court of Appeals is required to grant de novo review of judgments rendered on summary judgment; that is, it is required to apply the same standards the district court is required to utilize under Rule 56 Fed. R. Civ. P. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995); and *Jesinger v. Nevada Federal Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). That standard is:

> Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c).

As this Court has ruled, in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2522 (1986),

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party['s] case, and on which that party will bear the burden of proof at trial.

Moreover, a "scintilla" of evidence is not enough to create a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986). Nor do "mere allegation and speculation . . . create a factual dispute for purposes of summary judgment." *Nelson v. Pima Community College*, 83 F.3d 1075, 1081-82 (9th Cir. 1996) (citing *Witherow v. Paff*, 52 F.3d 264, 266 (9th Cir. 1995)).

The moving party has the burden of showing that there is no genuine dispute as to material facts. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). The moving party need not present evidence; it need only point out the lack of any genuine dispute as to material fact. *Celotex*, 477 U.S. at 323-25. Once the moving party has met this burden, the non-moving party must set forth evidence of specific facts showing the existence of a genuine issue for trial. *Id.*; *Anderson*, 477 U.S. at 248-49; *Adickes*, 398 U.S. at 160, n.22.

The non-moving party may not rest on mere allegations or denials, but must show that there is sufficient material evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial. *Anderson*, 477 U.S. at 252. There is no genuine issue of material fact when the relevant evidence in the record, taken as a whole, indicates that a reasonable fact-finder could not return a verdict for the non-moving party. *Id.*, at 248; *Matsushita Elec. Indus. Co. Ltr. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

These are the standards applied by the Court of Appeals in its de novo review of the summary judgment decisions of the district court, which utilized the very same standards. Like the district court, the Court of Appeals reviewed the

record evidence and determined that there was no genuine dispute as to any material facts, since McGinnis had failed to offer sufficient admissible evidence of specific facts showing the existence of a genuine issue for trial. In this appeal, McGinnis again relied on the allegations in her unverified complaint and mere speculation. In addition, like the district court, the Court of Appeals found that reasonable fact-finders could not return a verdict for McGinnis and the District was entitled to judgment as a matter of law. *See* App. D, p. 12a.

CONCLUSION

McGinnis has failed to candidly disclose the undisputed facts in the record before the district court and the Court of Appeals that resulted in the affirmance of summary judgment for the District. McGinnis has also failed to recognize and accept the rule established by the due process cases that require an opportunity for a pre-termination hearing before the termination becomes effective. McGinnis has failed to show that she was denied that opportunity required by due process under the facts in the record in this case. McGinnis has disingenuously argued that the Court of Appeals applied the incorrect standard in its de novo review of the summary judgment rulings made by the district court when the record plainly shows that both the district court and the Court of Appeals applied the correct standard under Rule 56 Fed. R. Civ. P.

Therefore, the District respectfully submits that McGinnis has failed to demonstrate any questions of national importance raised by the unpublished Memorandum decision issued by the Court of Appeals in this case and requests this court to deny this Petition for Writ of Certiorari.

Respectfully submitted,

BRADLEY D. OWENS
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APPENDIX A — RELEVANT STATUTES

Alaska Statute Sec. 14.20.170

Sec. 14.20.170. Dismissal. (a) A teacher, including a teacher who has acquired tenure rights, may be dismissed at any time only for the following causes:

(1) incompetency, which is defined as the inability or the unintentional or intentional failure to perform the teacher's customary teaching duties in a satisfactory manner;

(2) immorality, which is defined as the commission of an act that, under the laws of the state, constitutes a crime involving moral turpitude; or

(3) substantial noncompliance with the school laws of the state, the regulations or bylaws of the department, the bylaws of the district, or the written rules of the superintendent.

(b) A teacher may be suspended temporarily with regular compensation during a period of investigation to determine whether or not cause exists for the issuance of a notification of dismissal according to AS 14.20.180.

(c) A teacher who is dismissed under this section is not entitled to a plan of improvement under AS 14.20.149. (§ 2 ch 92 SLA 1960; am § 21 ch 98 SLA 1966; am §§ 1, 2, ch 104 SLA 1966; am § 8 ch 31 SLA 1996)

Appendix A

Alaska Statute Sec. 14.20.180

Sec. 14.20.180. Procedures upon notice of dismissal or nonretention.

(a) Before a teacher is dismissed, the employer shall give the teacher written notice of the proposed dismissal and a pretermination hearing. A pretermination hearing under this section must comport with the minimum requirements of due process including an explanation of the employer's evidence and basis for the proposed dismissal and an opportunity for the teacher to respond. If, following a pretermination hearing an employer determines that dismissal is appropriate, the employer shall provide written notice, including a statement of cause and a complete bill of particulars, of the decision. The dismissal is effective when the notice is delivered to the teacher.

(b) An employer that has decided to nonretain a tenured teacher shall provide the teacher with written notice, including a statement of cause and a complete bill of particulars. The notice must comply with AS 14.20.140(a).

(c) Within 15 days after receipt of a decision of dismissal under (a) of this section or nonretention under (b) of this section, a teacher may notify the employer in writing that the teacher is requesting a hearing before the school board under (d) of this section or that the teacher is invoking the grievance procedures under (e) of this section.

(d) Upon receipt of a request for a hearing, the employer shall immediately schedule a hearing and notify

the teacher in writing of the date, time, and place of the hearing. The teacher may elect to have either a public or a private hearing, and to have the hearing under oath or affirmation. The parties have a right to be represented by counsel and to cross-examine witnesses. The teacher has the right to subpoena a person who has made statements that are used as a basis for the employer's decision to dismiss or nonretain. A written transcript, tape, or similar recording of the proceedings shall be kept. A copy of the recording shall be furnished to the teacher, for cost, upon request of the teacher. A decision of the school board requires a majority vote of the membership, by roll call. The board's decision shall be in writing and must contain specific findings of fact and conclusions of law. A copy of the decision shall be furnished to the teacher within 10 days after the date of the decision. If the school board sustains the dismissal or nonretention, the teacher may appeal the decision to the superior court for judicial review based on the administrative record.

(e) Upon receipt of a notice invoking the grievance procedures, the school board shall immediately schedule an informal hearing and notify the teacher in writing of the date, time, and place of the hearing. The hearing is for the purpose of reviewing the statement of cause and bill of particulars and not for the purpose of taking evidence. The teacher may choose whether the informal hearing is held in public or in private. A decision of the school board requires a majority vote of the membership, by roll call. The board's decision shall be in writing. The board shall promptly furnish a copy of the decision to the teacher. If the board sustains the dismissal or nonretention, the teacher may,

within 15 days after receipt of the decision, give written notice to the school board and submit the matter to arbitration under the rules of the American Arbitration Association. The decision of the arbitrator is final and binding on the school board, the teacher, and the bargaining organization representing the teacher, if any. If the school board and the teacher agree, they may waive the informal hearing under this subsection and submit the matter directly to arbitration. (§ 3a ch 92 SLA 1960; am § 23 ch 98 SLA 1966; am §§ 2, 3, ch 11 SLA 1968; am § 14 ch 46 SLA 1970; am §§ 16, 17 ch 124 SLA 1975; am § 11 ch 31 SLA 1996)

(4)

Supreme Court, U.S.
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No. 98-1810

In The

Supreme Court of the United States

SHERRY L. McGINNIS,

Petitioner,

vs.

JOHN PATTERSON, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT JOHN B. PATTERSON

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QUESTIONS PRESENTED FOR REVIEW

Respondent John Patterson, Esq. disagrees with Petitioner McGinnis that there are any questions appropriately presented for review. The Petition for Certiorari does not mention, much less discuss, Petitioner's claims and appeal issues regarding Patterson, other than to make a cursory statement [at Pet. i] that she asserted various, unspecified Alaska common law claims in her underlying United States District Court diversity action. With respect to Patterson, Petitioner asserted a state common law legal malpractice claim, as well as Alaska common law breach of contract, misrepresentation, infliction of emotional distress, and conspiracy claims. The District Court granted summary judgment in favor of Patterson, finding on the undisputed facts of the case that Petitioner failed to show any genuine issue of material fact and that Patterson was entitled to judgment as a matter of Alaska law. Petitioner failed to discuss the facts of her claims against Patterson, and Patterson wishes to inform this Court of those facts to show why the Petition should be denied.

The United States Court of Appeals for the Ninth Circuit affirmed the District Court's grant of summary judgment in an unpublished Memorandum Decision and Order. The Court of Appeals agreed with the District Court that there were no genuine issues of material fact, and adopted the District Court's findings and conclusions. The Court of Appeals also found that Petitioner's appeal was frivolous. This Court can understand why the

QUESTIONS PRESENTED FOR REVIEW – Continued

Court of Appeals made that ruling by reference to the facts set forth below.

The Court of Appeals did not render a decision on an important matter that is in conflict with any decision of any other court, federal or state. The Court of Appeals did not decide an important federal question in conflict with a state court of last resort. The Court of Appeals did not depart from any accepted and usual course of judicial proceedings, nor did it sanction such a departure by the District Court.

Rather, Petitioner essentially argues that the Court of Appeals (and the District Court) made erroneous factual findings (*i.e.*, that there were no genuine issues of material fact) and misapplied Alaska law. This Honorable Court should deny the Petition for Certiorari because there is no appropriate and necessary question for review.

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I. STATEMENT OF THE CASE

In August 1983, Sherry McGinnis commenced employment as a high school teacher with the Anchorage School District (ASD). App. A, ¶ 10. ASD terminated her employment in April 1989. *Id.* ¶¶ 11, 16. McGinnis was a member of the Anchorage Education Association (AEA). *Id.* ¶¶ 81-83. After she was terminated by ASD, McGinnis requested that AEA assist her in securing her reinstatement with ASD. *Id.* ¶ 84.

AEA is a local union affiliated with NEA-Alaska, Inc., a statewide organization, and the National Education Association. App. B, ¶ 4. NEA-Alaska engaged John Patterson to assist plaintiff. *Id.* ¶¶ 10-11. Patterson was and is an attorney in good standing, with long experience in teacher dismissal cases, well regarded by people familiar with his work. *Id.*; App. C, ¶ 10.

Patterson filed suit on behalf of McGinnis against ASD. App. D. Following her termination by ASD, McGinnis attended California Western School of Law in San Diego, California, completing her degree requirements at the conclusion of the summer semester of 1992. App. E. (McGinnis became a member of the California bar in 1993. App. F. (McGinnis dep. 10, 13).) On June 16, 1992, the Alaska Superior Court granted Patterson's motion for summary judgment and issued an order requiring ASD to immediately reinstate McGinnis as a teacher, with no break in service. App. G.

Following receipt of the court order requiring ASD to reinstate her, McGinnis wrote a letter to Patterson, asking what she needed to do to become reinstated for the 1992-93 school year. App. H. Patterson responded by

letter dated July 21, 1992, App. I, advising McGinnis to contact ASD's personnel office to make arrangements for working, particularly in light of the fact that ASD had already attempted to contact McGinnis to arrange for her reemployment. Patterson's letter explained:

> **You do not need further information to respond to the District's offer to employ you in 1992-1993 in conformance with the trial court's order. . . .**
>
> **. . . Please do not think that you can put the District in a position of having to pay you for any part of the 1992-1993 year while you do not work. The District has now avoided that possibility by offering to put you to work. You now have the problem because you have not responded to a reasonable effort by the District to make contact with you and to normalize its relations with its employee.** Let me be perfectly clear here: if you do not now treat the District as any other employee would treat it you will lose this opportunity to go to work as a teacher for the District. This means you directly must contact the personnel office and make arrangements for working. Again, there should be nothing about this case from your point of view which would deter you from making this beginning. In other words, at least in terms of priorities, you need no further information "concerning (your) wrongful termination by the Anchorage School District," before proceeding to make normal arrangements with the District preparatory to assuming a teaching position this coming year. . . .

> I was told by Mr. Hemenway [an Anchorage attorney privately retained by plaintiff to evaluate her options against ASD] that you would be representing yourself. Perhaps he assumed that. But beyond that **I have made it perfectly clear that I will not represent you beyond the point of achieving your reinstatement. And that has been accomplished. Whether you are actually reinstated is entirely in your hands now. And I implore you not to miss this opportunity achieved at substantial effort.** I also believe AEA has accomplished its mission, so the matter of proceeding with this case is left to you . . . .
>
> As far as I can see the District is doing what the Court ordered as regards reinstatement. You should not read anything into the Order requiring the District to reinstate you regards following any particular procedure. The Order, I believe, means the District will treat you as any other employee, and if the District makes contact with its employees before putting them to work it is entitled to have contact with you before putting you to work. As I read the Order you, as regards reinstatement, are no longer a litigant or a special case. You are an ordinary certificated employee. YOU MUST CONTACT THE PERSONNEL DEPARTMENT.

App. I. (Capitalized emphasis by Mr. Patterson. Bold emphasis added.)

In response to Patterson's advice, on July 27, 1992, McGinnis wrote a letter to Edward Linquist, ASD's Executive Director of Personnel. App. J. She explained that "John Patterson informed me by letter dated July 21, 1992, that I should contact you directly to complete the arrangements for my reinstatement as a teacher. I am

most anxious to cooperate with you in resuming teaching responsibilities within Anchorage School District." McGinnis asked Linquist to provide her with details of her teaching assignment, and for a copy of her contract. *Id.*

On August 7, 1992, McGinnis wrote a second letter to Linquist. App. K. She stated:

> **Earlier today I received a telephone call from Lance Bowie, principal of West High School, confirming my 1992-1993 teaching contract with the Anchorage School District.** Lance made the following representations . . . I have been assigned to West High School for the 1992-1993 school year . . . I'm pleased with the position and particularly the assignment to West High School. . . .

(Emphasis added.)

On August 20, 1992 McGinnis wrote a third letter to Linquist. App. L. She stated:

> Earlier today I received a telephone call from Karen who identified herself as an employee in the Personnel Department of the Anchorage School District. **Karen stated she had a prepared teaching contract ready for my signature and wanted to know if she should mail it to me.** . . . Given the fact that her telephone call was made only five days prior to the teachers' reporting date for the beginning of school, Karen agreed it would be logistically impossible for a mailing from Alaska to reach me in California prior to my departure for Alaska. Therefore, Karen assured me that both my contract and my benefits package would be available at West

> High School upon my arrival Tuesday morning, August 25, 1992, when I report for teaching. . . .

(Emphasis added.)

McGinnis testified that when she reported to West High School on August 25, 1992, she met with principal Bowie and demanded to be presented with a written contract. The written contract was not physically at the high school, and Bowie suggested that she should contact ASD's administrative offices to obtain her contract. App. F, pp. 19, 119, 620. McGinnis admitted that she did not contact anyone at or go to ASD administrative offices to sign her contract. *Id.* App. F, pp. 620-21. Further, McGinnis did not remain at West High School, she did not attend the scheduled teachers' in-service program, but instead, she departed the school premises and never returned, ostensibly because the contract was not physically at West High School upon her arrival. *Id.* App. F., pp. 19, 118-19.

A day after McGinnis departed from West High School, she met with Patterson to seek his advice. *Id.* App. F., p. 622. Patterson told McGinnis that she had a contract with the ASD by virtue of the Superior Court's order requiring ASD to reinstate her, and that even though a written contract had not been tendered to her, she should not fail to tender her services and perform her duties to ASD. *Id.* App. F, pp. 628-29, 632-34. McGinnis asked Patterson to put that advice in writing, and he did so, writing out his advice by hand, and giving it to her. App. M, App. F, pp. 624, 632-34. Patterson's note reads:

> Sherry, you have a contract to teach with ASD. Your written contract may not have been tendered, but do not fail to perform your duties on that account.
>
> If they refuse you access to your class or finally expressly refuse to provide the written contract, I likely would tell you you are excused from tendering your services any further. But do not fail to tender those services until I tell you it is clear ASD will not allow you to work.

App. M. Patterson counseled her to return to West High School, but she refused. App. F, p. 631. Patterson advised McGinnis to contact ASD's personnel department, but she also refused to do that. *Id.* McGinnis admitted that she ignored Patterson's advice. *Id.*

Mark Jones, an NEA-Alaska representative, also attempted to persuade McGinnis to return to West High School and contact ASD. App. C, ¶ 1. Jones' responsibilities included providing advice and assistance to the AEA and its members. *Id.* Jones had become aware that McGinnis had reported to West High School, but then had gone absent without leave because her written contract was not waiting for her there. *Id.* ¶¶ 6, 7. Jones notified McGinnis that her action was an inappropriate response to ASD's failure to have the written contract at West High School. *Id.* ¶ 7. Jones also counseled McGinnis to return to work, but she did not take his advice. *Id.*

On August 31, 1992, Jones wrote a letter to McGinnis, App. N, which stated:

> As per our conversation of August 27, 1992, the Anchorage School District has requested a meeting with you and your Association representative prior to your return to work. The meeting was intended to deal with your actions on Tuesday, August 25, 1992. On August 25, 1992 you discovered that a written contract was not waiting for you at your assigned work site, West High School. Your response was to leave West High School. You notified Attorney John Patterson of your actions in this matter late in the afternoon of August 26, 1992. At that time you were notified by Mr. Patterson and by myself, via John Patterson, that your absence from your assigned duty station was an inappropriate response to the district's failure to supply you with a written contract. At that time both Mr. Patterson and I advised you that you should return to your duty station as soon as possible. As of Thursday afternoon, August 27, 1992, you had not returned to work. . . .

Mr. Patterson also followed up with a letter to McGinnis, dated August 28, 1992. App. O. Patterson wrote:

> A few days ago when we visited at my office I was saddened to see how poorly we communicate and how suspicious you are of my advice to you. I understand now you have the written contract from Anchorage School District, and have been invited to sign it and return it. Mark [Jones] tells me, however, that you have not returned the contract and have not been in the classroom. You can see your concern that you did not have a "contract" with the district was misplaced. . . .

The contract face sheet, signed by the School Board President, but not by McGinnis, is found at App. P.

McGinnis ignored all of Patterson's advice. She never reported to West High School, she never contacted or met with ASD personnel or administrative departments, and she never signed and returned her written contract. She was finally terminated by ASD for her failure to return to work, by letter dated August 31, 1992. App. Q. ASD's Executive Director of Personnel, Edward Linquist, wrote:

> This letter is to inform you that your employment with the Anchorage School District has been terminated for unauthorized absences.
>
> It was reported that you arrived at your assignment at West High School on Tuesday morning, August 25, told the principal you would not work without a signed contract, and you were directed to go to the Personnel Department to take care of the matter.
>
> You have neither come to the Personnel Department nor returned to your assigned location at West High School. Further, you have not contacted any District official during that period of time. Efforts to contact you have been futile since you have provided no phone number at which you can be reached. Your conduct in this matter has been clearly unprofessional. . . .

Linquist further explained that McGinnis had a right to request a hearing before the School Board within 15 days, and attached a copy of the procedures regarding administrative appeal remedies. *Id.* McGinnis never filed a request for a hearing.

McGinnis filed this lawsuit on August 24, 1994. App. A. At the outset of the case, and up through the time that she filed her opposition to Patterson's motion for summary judgment, App. R, she represented herself *in propria persona*. She brought suit against Patterson, ASD, AEA, and her former worker's compensation attorney, Chancy Croft, making various claims that these defendants, individually and collectively, caused her damages, including the second loss of her job with ASD. She alleged that Patterson, who succeeded in winning her first lawsuit against ASD, was negligent in his representation of her, that he made intentional misrepresentations to her, that he breached his contract of representation with her, that he conspired with ASD and AEA, and that he, along with the other defendants, intentionally and negligently inflicted emotional distress upon her. App. A. She sought $60 million in damages. *Id.*

II. ARGUMENT

Patterson's motion for summary judgment established that there were no genuine issues of material fact with respect to McGinnis' five claims against him (with the limited exception of McGinnis' contract/tort claim for legal fees paid to attorney Hemenway, in the amount of $345, App. T, which claim has been resolved by compromise and is thus moot for purposes of this appeal. App. S.

The Court found that there was a narrow and limited issue of fact with regard to McGinnis' breach of contract and negligence claims. App. T. McGinnis alleged she had to engage another attorney, Andy Hemenway, for a time

to "jolt" Patterson into continuing to work on her case and to prevent the case from being dismissed. In fact, during the time when McGinnis alleged Patterson was not working on her case, Patterson's motion for summary judgment was pending before the Alaska court without opposition, and in the interim, ASD had engaged in settlement negotiations. The state court clerk issued a notice of intent to dismiss the case for failure to prosecute, and Patterson filed an objection correctly pointing out that his motion for summary judgment was pending before the court, and the court should either require ASD to oppose it, or grant the motion. Several months prior to the time of the notice of intent to dismiss, McGinnis had retained attorney Hemenway for a consultation with respect to a proposed settlement, for which McGinnis was billed a total of $345 in legal fees for Hemenway's time. The Alaska court agreed with Patterson's objection and required ASD to oppose Patterson's pending motion for summary judgment. The Alaska court ultimately granted that motion in McGinnis' favor.

In ruling on Patterson's motion for summary judgment in the instant case, the District Court ruled that there was a genuine issue of material fact whether Patterson had breached either a contractual or professional duty that might have caused McGinnis to have to pay $345 to attorney Hemenway, but otherwise, the Court ruled that there was no evidence to support any of McGinnis' other claims of breach of contract or professional negligence, and those claims were dismissed. App. T. Patterson and McGinnis entered into a stipulated dismissal, App. S, of the "remaining claims" from the Court's order at App. T, thus resolving all of McGinnis'

"remaining claims" against Patterson, and making the Court's summary judgment ripe for appeal.

McGinnis had the burden of coming forward with competent, admissible evidence to defeat Patterson's motion, and she failed to do so. That is not surprising, because there was no such evidence. Instead, McGinnis relied solely on her allegations set forth in her complaint, on her unsupported speculations of conspiracy, on self-serving declarations, on unfounded accusations of wrongdoing, and on mischaracterization of statements in correspondence and pleadings.

The District Court (and the Ninth Circuit Court of Appeals) found no evidence to support McGinnis' claim for misrepresentation. To avoid summary judgment, McGinnis had the burden of adducing admissible evidence supporting each and all elements of a misrepresentation claim: an intentional, knowingly untrue statement of fact intended to induce reliance, upon which she actually and reasonably relied, upon causing her harm. McGinnis' appeal brief was noteworthy because she failed to identify any evidence to support each of these essential elements, and in fact, she completely failed to even address these elements.

McGinnis had the burden of adducing admissible evidence supporting each and all elements of a breach of contract claim: the existence of an enforceable contract containing definite terms between Patterson and her, Patterson's failure to perform his duties, and damages sustained by McGinnis proximately caused by the breach. McGinnis failed to present admissible evidence to support any of these elements.

McGinnis had the burden of adducing admissible evidence supporting each and all elements of a professional negligence claim: a duty by Patterson to exercise reasonable care, a breach of that duty, and harm proximately caused thereby. Patterson was retained by McGinnis' union to attempt to obtain her reinstatement by ASD. Patterson obtained a court order requiring ASD to reinstate McGinnis. McGinnis argued that Patterson breached his duty to her by abandoning her state court case for a period of time, and refusing to seek relief (contract and tort damages) beyond reinstatement. There was no competent evidence to support these allegations, and no evidence submitted to establish that any harm was caused even if her allegations were true. The evidence she did rely on, letters by Patterson, showed that he told her he was **not** representing her with respect to whatever tort or contract damages claims she might wish to pursue. *See* App. I, Patterson's July 21, 1992 letter: "I have made it perfectly clear that I will not represent you beyond the point of achieving your reinstatement." (Incidentally, if this unequivocal statement by Patterson constituted a breach of his professional duty to McGinnis, then her complaint making her claim of negligence, filed August 24, 1994, App. A, was barred by Alaska's two-year statute of limitations for tort claims. AS 09.10.070.)

McGinnis had the burden of adducing admissible evidence supporting each and all elements of a civil conspiracy claim. McGinnis offered nothing other than wildly speculative conspiracy theories, none of which will withstand summary judgment scrutiny.

Finally, McGinnis had the burden of adducing admissible evidence supporting each and all elements of a

claim for intentional and negligent infliction of emotional distress. The Court found no evidence to support such a claim, and McGinnis continued to fail to establish by any admissible evidence that Patterson inflicted actionable emotional distress upon her.

McGinnis had the burden of proof as to all elements essential to her case against Patterson, and she failed to make a showing sufficient to establish a genuine dispute of fact with respect to the existence of any of those elements; therefore summary judgment was mandated. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). With respect to each and every element of each of her claims, McGinnis was required to offer more than conclusory statements and self-serving declarations to avoid summary judgment. *United States v. Wilson*, 881 F.2d 596, 601 (9th Cir. 1989). Her mere allegations and speculations did not create a factual dispute for purposes of summary judgment. *Nelson v. Pima Community College*, 83 F.3d 1075, 1081-82 (9th Cir. 1996).

The "evidence" submitted by McGinnis was, at best, merely colorable, and therefore summary judgment was granted. Moreover, inasmuch as only disputes over facts that affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment, because the factual disputes that were argued by McGinnis were irrelevant or unnecessary, they could not be counted to defeat summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986). One such irrelevant factual dispute concerned McGinnis' claim that Patterson withdrew effective assistance of counsel for a time while

his (ultimately successful) summary judgment motion was pending in the Alaska Superior Court, allegedly necessitating her engaging attorney Hemenway, whose bill for legal services amounted to only $345. This argument was not only irrelevant, it was deceptive and misleading.

Finally, the factual context of her case (walking off the job on the first morning of her reinstatement on the grounds that ASD did not provide her with a written contract at West High, and then claiming that ASD, with Patterson's and AEA's complicity, had a secret intent not to reinstate her in violation of the court order Patterson successfully obtained for her) made McGinnis' claims implausible, and therefore, she had the burden of coming forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). *See also California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468-69 (9th Cir. 1987), *cert. den.*, 489 U.S. 1006 (1988). She was unable to do so, because there was no evidence, much less more persuasive evidence, to support her claims.

The Court of Appeals had before it the records and materials provided by McGinnis and the four Respondents. The Court of Appeals agreed with the District Court that McGinnis failed to adduce any admissible evidence to overcome Patterson's and the other Respondents' Motions for Summary Judgment. Indeed, McGinnis' appeal was so lacking in merit given the facts and circumstances of her having walked off her job after Patterson's having won reinstatement for her at the state

court level that the Court of Appeals determined that her appeal was frivolous.

It is little wonder that on this record, the Court of Appeals would use the expedient of adopting the District Court's careful findings and analysis, and affirm the District Court in a Memorandum Decision and Order. This was a wise and efficient procedural decision by the Court of Appeals, and one that rests soundly in the Court's discretion.

There are no questions of national importance raised by Petitioner; there are no conflicting opinions between federal Courts of Appeal or between federal courts and state courts of last resort. All that is presented by the Petition at bar is a disagreement with the Court of Appeals and the District Court that those courts found no genuine issues of material fact sufficient to overcome the Respondents' summary judgment motions. This is hardly the kind of case that merits this Court's valuable attention.

III. CONCLUSION

Petitioner McGinnis failed to candidly discuss the true facts and circumstances of her claims against Patterson and the other Respondents. Once these true facts and circumstances are appreciated, it becomes plainly obvious that like her appeal, this Petition is frivolous and should

be denied forthwith. Respondent Patterson respectfully requests that this Court deny the Petition for Certiorari.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT IN AND FOR THE THIRD JUDICIAL DISTRICT OF ALASKA

(Filed Aug. 25, 1994)

SHERRY L. McGINNIS Plaintiff, vs. ANCHORAGE SCHOOL DISTRICT, ANCHORAGE EDUCATION ASSOCIATION, and CHANCEY CROFT and JOHN PATTERSON as individuals Defendants.	Case No. A94 385 CIV **COMPLAINT FOR DAMAGES FOR DISCRIMINATION, VIOLATION OF STATUTES, ACTS IN VIOLATION OF PUBLIC POLICY, FRAUD, CONVERSION, NEGLIGENCE, CONSPIRACY, AND BREACH OF CONTRACT(S)** **(REQUEST FOR JURY TRIAL)**

Plaintiff, for causes of action against Defendants, and each of them, alleges as follows:

1. Subject matter jurisdiction in this court is predicated upon 28 U.S.C. §1332 diversity of citizenship, in that it is a civil action between citizens of different states.

The amount in controversy exceeds fifty thousand dollars, exclusive of interests and costs.

2. Plaintiff is a resident of the State of California and is domiciled in the State of California.

3. Defendant Anchorage School District is a public education entity which serves the greater Anchorage, Alaska area as the public school system for children of residents of the greater Anchorage, Alaska geographical area. Anchorage School District maintains administrative offices constituting its principle [sic] place of business at 4600 DeBarr Avenue, Anchorage, Alaska 99519.

4. Defendant Anchorage Education Association (hereinafter ("AEA") is a collective bargaining unit of teachers which acts as the agent for its members in bargaining, negotiations, lawsuits, and grievance proceedings, with or against Co-Defendant the Anchorage School District. AEA maintains administrative offices constituting its principle [sic] place of business at 1411 West 33rd Avenue, Anchorage, Alaska 99503.

5. Defendants Chancey Croft and John Patterson are domiciled in the State of Alaska and are residents of the State of Alaska.

6. Venue is proper in this court in that all Defendants reside in the County of Cook, State of Alaska and/or have offices in Anchorage, Alaska which constitute their principle [sic] place of business. In addition, the contracts sued upon herein were entered into and were to be executed in the County of Cook, State of Alaska, and all claims herein arose in the County of Cook, State of Alaska.

7. Plaintiff is informed and believes and thereupon alleges that at all times herein mentioned, Defendant John Patterson was the agent and employee of Defendant AEA, and in doing the things herein alleged, was acting within the course and scope of such agency and employment and with the permission and consent of AEA.

8. Plaintiff is informed and believes that Defendants and each of them, are in some manner responsible for the acts, events, wrongs, deeds and injuries herein alleged.

9. Plaintiff is informed and believes that at all times mentioned herein, Defendants Chancey Croft and John Patterson were licensed to engage in the practice of law in the State of Alaska, and were engaged in the practice of law at 437 "E" Street, Suite 400, Anchorage, Alaska 99503, and 2263 Spenard Road, Anchorage, Alaska 99503, respectively.

10. On or about August 8, 1983, pursuant to a partly written and partly oral contract Plaintiff commenced employment with the Anchorage School District as a high school teacher duly certified by the State of Alaska. Initially, the contract was for a definite stated period commonly known as a school year (approximately nine months), with periodic evaluations and reviews, and renewable upon the parties mutual agreement for subsequent school years.

11. Plaintiff was continuously employed by the Anchorage School District under contracts of employment from 1983 until the District terminated her employment in 1989.

12. Pursuant to Plaintiff's contract of employment with Anchorage School District and pursuant to Alaska's employment of teachers statutes, sections AS 14.20.010 *et seq.*, Plaintiff was entitled to continued employment for so long as she performed her teaching responsibilities satisfactorily and obeyed all reasonable and lawful directions, rules, and regulations of her employer.

13. Plaintiff performed her teaching responsibilities satisfactorily, received satisfactory merit reviews, was a loyal and trusted employee, was honored on numerous occasions through conferral of awards and accolades and acknowledgements of her professional attitude and approach to teaching high school students, and she obeyed all rules and regulations of her employer. Due to Plaintiff's satisfactory work performance she was given periodic increases in compensation and other work related benefits, such as choices of teaching assignments and etcetera.

14. Due to Plaintiff's contract of employment with Anchorage School District, the statutorily conferred tenure rights and benefits, the length of Plaintiff's satisfactory employment, the absence of criticism, and Anchorage School District's express and implied policies and procedures, including financial and other incentive to remain in the District's employment and to reject opportunities for other employment, Plaintiff reasonably expected, and Anchorage School District expressly and impliedly promised, that Plaintiff's employment would not be arbitrarily and without good cause terminated before normal retirement.

FIRST CAUSE OF ACTION:
DISCRIMINATION IN EMPLOYMENT
(Anchorage School District)

15. Plaintiff refers to and realleges Paragraphs 1 through 14, and incorporates the same herein as though fully set forth.

16. On or about April 5, 1989, Anchorage School District notified Plaintiff that her employment was terminated "retroactively" to January 9, 1989. Also, by a letter dated April 18, 1989, the District notified Plaintiff that her employment with the District was terminated.

17. For the third time, on or about August 31, 1992, Anchorage School District notified Plaintiff that effective immediately her employment was terminated.

18. On January 7, 1988, Plaintiff had suffered an accident on Anchorage School District premises while engaged in duties related to her teaching assignment at Dimond High School in Anchorage, Alaska. The accident caused serious injury to Plaintiff's spine resulting in virtual immobilization and excruciating pain. After authorized consultation with general medical practitioners and with spinal injury specialists it was determined that Plaintiff's injury required a series of major surgeries. During the surgeries, a medical device known as "Cotrel-Dudousset instrumentation" which consists of two stainless steel rods, numerous screws, and various other fixtures, was permanently affixed to Plaintiff's spinal column. Various other surgical procedures were also required, including a bone harvest and graft from Plaintiff's pelvis onto Plaintiff's spine, and the harvest of one rib to supply bone to fuse Plaintiff's spine. The surgical

procedures caused a permanent anterior and posterior fusion of the vertebra of Plaintiff's spine from T5 to L4 in order to alleviate Plaintiff's pain and disablement. True and accurate photocopies of x-rays of Plaintiff which shows Plaintiff's injured spine and the instrumentation that has been surgically affixed to Plaintiff's spine is attached hereto as Exhibit "A," and is incorporated herein by this reference as though fully set forth.

19. Plaintiff's spinal fusion surgical procedures were completed in late November, 1988, and she began an arduous and painful recovery period. Now, after four plus years following the spinal fusion, Plaintiff remains partially disabled by the accident injuries she sustained. In fact, Plaintiff's partial disability is a permanent medical condition that she must live with, and make accommodation for, each and every day of her life.

20. Plaintiff's physical disability was/is not completely debilitating and with minor accommodations, such as chair padding or cushions, Plaintiff was/is physically able to perform all necessary work related teaching duties.

21. Instead of providing accommodation to a respected, honored, dedicated, and tenured member of its teaching staff, the Anchorage School District arbitrarily and maliciously:

(a.) Refused to pay for Plaintiff's surgical procedures,

(b.) Summarily discharged Plaintiff from employment in 1989 in violation of Alaska's tenure statutes and without just cause,

(c.) Denied Plaintiff access to employment in 1992 despite a judgment ordering full reinstatement to employment by the Superior Court of the State of Alaska, case no. 3AN-89-8657-Civil,

(d.) Perpetrated fraud upon Plaintiff to cause Plaintiff to believe she was reinstated and to cause Plaintiff to move from California to Alaska in 1992 believing she could continue employment as a tenured teacher,

(e.) Misrepresented to Plaintiff on numerous occasions in 1992 that a contract of employment had been prepared and would be available at certain designated times and locations, when in fact it was not,

(f.) Denied Plaintiff access to books, course assignments, teaching schedules, and other aids necessary to prepare to work as a teacher in 1992,

(g.) Notified Plaintiff by letter dated August 31, 1992, that her employment was terminated,

(h.) Engaged acts, tactics, and practices designed to "cover-up" the fact that Plaintiff was denied employment in 1992, including, but not limited to, generating after-the fact a document that purports to be a contract of employment that the District falsely contends was offered to Plaintiff, and

(i.) Continue to withhold compensation from Plaintiff for teaching services rendered in an amount not less than two thousand

seven hundred sixty dollars and twenty-one cents ($2,760.21).

22. Plaintiff is informed and believes and thereon alleges that Anchorage School District:

(a.) Is partially "self-insured" in that it is ultimately responsible for payment of the costs of its employees worker's compensation benefits,

(b.) Affirmatively acts to disguise its interest and exposure to financial liability for the worker's compensation and other health care costs of its employees through a myriad of agents, transactions, and companies which purport to act as insurer's and/or insurance adjusters for the District,

(c.) Utilizes a variety of wrongful acts and practices that are calculated to limit the District's exposure to health care costs and worker's compensation benefits due to its employees,

(d.) Denies outright, or engages in conduct calculated to cause the District's purported "insurer" to deny coverage for, and/or payment of, necessary costs incurred by its employees who sustain on-the-job injuries, and

(e.) Utilizes wrongful practices, including discriminatory termination of employees, to limit the District's long-term exposure to health care costs related to employee's on-the-job injuries.

23. Anchorage School District's affirmative acts and practices regarding worker's compensation benefits and

health care coverage for Plaintiff's medical disability, and employees or former employees who are similarly situated, effectively deprive these individuals of the benefit of law(s) of the State of Alaska which exist to protect disabled citizens from invidious discrimination in employment, and identified herein as Alaska Statute, sections 18.80.200, 18.80.210, 18.80.220, and 18.80.255.

24. As a result of its wrongful acts, the Anchorage School District affirmatively, intentionally, with malice, and without just cause terminated Plaintiff's tenured employment. The termination was motivated by the fact of Plaintiff's work related injury and subsequent physical disability and was in violation of the Alaska statutes cited above in paragraph number 23.

25. The acts of Anchorage School District have directly and proximately caused severe emotional injury and monetary damages to Plaintiff through the loss of her right to tenured employment with all rights and benefits appurtenant.

26. Alaska Statute, section 22.10.020 provides authority for compensatory and punitive damages as a result of Anchorage School District's wrongful acts towards Plaintiff.

27. In doing the acts herein alleged, Anchorage School District acted intentionally, oppressively, maliciously, fraudulently, and outrageously toward Plaintiff with conscious disregard of her known rights, and with the intent of causing, or in willfully disregard of the probability of causing unjust and cruel hardship to Plaintiff and her family and discharged her without just cause. In so acting, Anchorage School District intended to and

did vex, injure, and annoy Plaintiff, creating in Plaintiff the right to punitive damages.

SECOND CAUSE OF ACTION:
DISCHARGE IN VIOLATION OF PUBLIC POLICY
(Anchorage School District)

28. Plaintiff refers to and realleges Paragraphs 1 through 14 and Paragraphs 15 through 27 of the First Cause of Action, and incorporates the same herein as though fully set forth.

29. During the Spring school semester of 1987, Plaintiff refused the suggestion of her supervisor, Dimond High School Principle [sic], Don Barta, to revise Plaintiff's grading system for her English classes in order to artificially inflate student's grades.

30. Plaintiff is informed and believes and thereon alleges that her demonstrated commitment to ethics in grading standards infuriated her supervisor, who initiated retaliatory actions against Plaintiff. The retaliation culminated with Plaintiff initiating a grievance proceeding against Mr. Barta.

31. Plaintiff prevailed in the grievance proceeding.

32. Plaintiff is informed and believes and thereon alleges that the grievance proceeding further inflamed and infuriated her supervisor and other administrative officials of Anchorage School District.

33. Approximately six months later, Plaintiff suffered the accident causing the injuries identified above. Anchorage School District refused payment, or caused its agents and employees to refuse payment, for Plaintiff's

medical treatment and Plaintiff was forced to hire an attorney to pursue medical care benefits to with she was entitled.

34. Plaintiff's legal action resulted in her recovery from the Anchorage School District of more than ninety-seven thousand dollars reimbursement for medical care and worker's compensation benefits due her.

35. In addition, Defendant AEA initiated legal action against Anchorage School District in an effort to gain reinstatement of Plaintiff's employment in the Superior Court of Cook County, State of Alaska, case number 3AN-89-8657 Civil.

36. The legal action for reinstatement culminated in a June 16, 1992, summary judgment in favor of the Plaintiff. Anchorage School District was ordered to reinstate Plaintiff to her prior position of employment.

37. Following the summary judgment order, Anchorage School District falsely represented to Plaintiff that she could continue employment, denied Plaintiff access to employment, and then re-terminated Plaintiff as alleged.

38. Plaintiff is informed and believes and thereon alleges that Anchorage School District's termination of Plaintiff's employment was due to reprisals against Plaintiff for:

(a.) Plaintiff's refusal to revise grading scales to inflate student's grades,

(b.) Increasing Anchorage School District's exposure to liability to pay for Plaintiff's

health care expenses due to Plaintiff's on-the-job injury, and

(c.) Plaintiff's efforts to gain the benefits afforded her by law against Anchorage School District's wrongful conduct, through her pursuit of: (1.) a grievance proceeding, (2.) a worker's compensation proceeding, and (3.) through Co-Defendant AEA's efforts to gain Plaintiff's reinstatement to employment through lawful court process.

39. Anchorage School District's termination of Plaintiff's employment is retaliatory and is against fundamental public policies of State of Alaska and of the United States which are designed to protect an individual from retaliation when that individual exercises statutory and constitutional due process rights through lawful process.

40. Anchorage School District's retaliatory actions wrongfully deprived Plaintiff of a tenured position of employment as a teacher with all of the rights and benefits appurtenant. Additionally, Plaintiff has suffered monetary and emotional damages directly and proximately caused by Anchorage School District's wrongful acts.

41. In doing the acts herein alleged, Anchorage School District acted intentionally, oppressively, maliciously, fraudulently, and outrageously toward Plaintiff, with conscious disregard of her known rights, and with the intent of causing, or in willfully disregard of the

probability of causing unjust and cruel hardship to Plaintiff and her family. In so acting, Anchorage School District intended to and did vex, injure, and annoy Plaintiff, creating in Plaintiff the right to punitive damages.

THIRD CAUSE OF ACTION:
MISREPRESENTATION OF FACT TO INDUCE RELOCATION FOR EMPLOYMENT PURPOSES
(Anchorage School District)

42. Plaintiff refers to and realleges Paragraphs 1 through 14 and Paragraphs 15 through 41 of the First and Second Causes of Action, and incorporates the same herein as though fully set forth.

43. By a letter dated June 29, 1992, Anchorage School District falsely and fraudulently represented to Plaintiff that she was offered reinstatement to her tenured position as a high school teacher.

44. At the time Anchorage School District made the representation to Plaintiff, the District had no intention to reinstate Plaintiff or to perform on its promises to Plaintiff.

45. At the time Anchorage School District made the representation and promises of Plaintiff's reinstatement, the District was aware that Plaintiff had relocated to the State of California in order to complete her physical rehabilitation in a warmer and more conducive geophysical climate and to attend law school classes.

46. Plaintiff is informed and believes and thereon alleges that the Anchorage School District made its promises to Plaintiff after calculating that Plaintiff would

voluntarily choose to decline the District's asserted but false offer of reinstatement to her former teaching position in Anchorage, Alaska and choose to remain domiciled in California where she had recently graduated from law school.

47. Plaintiff, at the time the promises of reinstatement were made, and at the time the Plaintiff took the action of relocating to Alaska, was ignorant of the Anchorage School District's secret intention not to perform its promises and Plaintiff could not, in the exercise of reasonable diligence, have discovered the District's secret intention. If Plaintiff had known of the actual intention of the District, Plaintiff would not have taken action and incurred substantial expense in order to move back to Alaska.

48. Plaintiff relocated to Alaska and she was physically present to begin her teaching assignment on the day, at the time, and at the location she had been falsely led to believe that would be her assigned teaching location, West High School.

49. Anchorage School District failed to honor its promises to Plaintiff in that it failed to:

(a.) Confirm employment by providing Plaintiff with a written contract of tenured employment, or otherwise confirm its asserted, but false, and illusory promises of employment, despite Plaintiff's requests for a teaching contract,

(b.) Provide Plaintiff with teaching materials, books, course descriptions, schedules, and etcetera, even after her repeated written

and verbal requests for same. The District's failure to provide these essential teaching preparation materials deprived Plaintiff of any meaningful opportunity to prepare for and to teach high school classes.

(c.) Compensate Plaintiff for teaching services rendered in the amount alleged.

50. When Anchorage School District made the false representations to induce Plaintiff to move to Alaska on the pretense that her employment was reinstated, the District acted wrongfully and in violation of laws of the State of Alaska. In particular, Alaska Statute, section 23.10.015 prohibits the wrongful acts as herein alleged.

51. As a direct and proximate result of the Defendant's fraud and deceit upon the facts herein alleged, Defendant wrongfully induced Plaintiff to move from the State of California to the State of Alaska and caused Plaintiff to suffer severe emotional stress and distress and monetary damages though [sic] relocation expenses.

52. Alaska Statute, section 23.10.030 provides authority for compensatory damages and for attorney fees to Plaintiff as compensation for Anchorage School District's wrongful acts towards Plaintiff.

FOURTH CAUSE OF ACTION:
BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IN AN EMPLOYMENT RELATIONSHIP
(Anchorage School District)

53. Plaintiff refers to and realleges Paragraphs 1 through 14 and Paragraphs 15 through 52 of the First

through Third Causes of Action, and incorporates the same herein as though fully set forth.

54. In acting as alleged Anchorage School District wrongfully and unreasonably breached express and implied promises and its duties implied in the employment contract and expressed and implied in Alaska's employment of teachers statutes at AS 14.20.010 *et seq.*, to deal fairly and in good faith with Plaintiff.

55. Plaintiff was continuously employed by Anchorage School District in excess of six years, and by virtue of the continuous employment and pursuant to Alaska law Plaintiff was entitled to tenure rights and privileges in her position of employment.

56. By entering into and continuing the employment relationship, Plaintiff sought to obtain financial stability, peace of mind, and future security. Anchorage School District knew at all material times that because of Plaintiff's age, financial responsibilities, and physical disability resulting from her work related accident, Plaintiff was extremely vulnerable to substantial harm from the termination of her employment. Anchorage School District also knew that at all material times Plaintiff was in an inherently unequal bargaining position with the District and had placed trust and confidence in the District to act fairly and in good faith toward Plaintiff.

57. As a direct and proximate result of Anchorage School District's conduct, Plaintiff sustained economic losses, including past and future compensation, other economic benefits, attorney's fees, and litigation costs. Plaintiff has also lost financial stability, peace of mind, and future economic security. In addition, Plaintiff has

suffered embarrassment, humiliation, mental and emotional stress, distress, and discomfort all to her detriment.

58. In doing the acts herein alleged, Anchorage School District acted intentionally, oppressively, maliciously, fraudulently, and outrageously toward Plaintiff, with conscious disregard of her known rights, and with the intent of causing, or in willfully disregard of the probability of causing unjust and cruel hardship to Plaintiff and her family and discharged her without just cause. In so acting, Anchorage School District intended to and did vex, injure, and annoy Plaintiff, creating in Plaintiff the right to punitive damages.

FIFTH CAUSE OF ACTION: CONVERSION
(Anchorage School District)

59. Plaintiff refers to and realleges Paragraphs 1 through 14 and Paragraphs 15 through 58 of the First through Fourth Causes of Action, and incorporates the same herein as though fully set forth.

60. At the time(s) Anchorage School District terminated Plaintiff, there was an amount of compensation and employment benefits in the amount of two thousand seven hundred sixty dollars and twenty-one cents ($2,760.21) due and owing to Plaintiff for teaching services previously rendered.

61. Plaintiff has a lawful right to possession of the full amount of compensation due to her for services previously rendered to Anchorage School District.

62. Anchorage School District has interfered with Plaintiff's right to possession, dominion, and control of the $2,760.21.

63. At the time Anchorage School District interfered with Plaintiff's right to possession, and at all times thereafter, the District had knowledge of Plaintiff's right to possess the full amount of compensation, but acted in disregard of its knowledge and deprived and wrongfully dispossessed Plaintiff of $2,760.21.

64. Plaintiff is damaged by Anchorage School District's interference with Plaintiff's right to possession, dominion, and control of $2,760.21, in the amount stated plus interest at the maximum percentage rate allowed by law.

SIXTH CAUSE OF ACTION:
INTENTIONAL MISREPRESENTATION OF FACT
(Anchorage School District, AEA, and John Patterson)

65. Plaintiff refers to and realleges Paragraphs 1 through 14 and Paragraphs 15 through 64, of the First through Fifth Causes of Action, and incorporates the same herein as though fully set forth.

66. Defendant, Anchorage School District, communicated with Plaintiff in California via letters and telephone calls. In the letters and during the telephone conversations the District represented that a high school teaching position was being offered to the Plaintiff, and that upon her return to Anchorage, Alaska, she would be reinstated to her former high school teaching position.

67. Plaintiff is informed and believes and thereon alleges that Anchorage School District had knowledge of the fact of Plaintiff's California residence and graduation from law school in San Diego, California. Further, due in part to the fact that the District had knowledge of Plaintiff's relocation to San Diego, California, and due in part to the fact that a summary judgement rendered by the Superior Court of the State of Alaska (Case No. 3AN-89-8657) ordered the District to reinstate Plaintiff's employment, the District made its purported, but false, offer of reinstatement.

68. Plaintiff is informed and believes and thereon alleges that Anchorage School District calculated that it could avoid meaningful compliance with court's order of summary judgment when it made the asserted, but false, offer of reinstatement. The District calculated that Plaintiff was either unable, due to her disabling physical condition, or unwilling to move from San Diego, California, back to Anchorage, Alaska, in order to resume her high school teaching career.

69. Plaintiff is informed and believes and thereon alleges that Anchorage School District's acts were intentional, misleading, fraudulent, and calculated to achieve its wrongful purpose of eliminating or greatly reducing the District's exposure to liability for its acts, past and contemporary, which wrongfully deprived Plaintiff of her tenured employment rights under law.

70. Defendants Anchorage School District, AEA, and John Patterson acted with intent and in disregard of their knowledge of the true facts of Anchorage School District's wrongful termination of Plaintiff's employment

as herein alleged, and participated in acts designed to mislead Plaintiff and cause her to believe something other than the true facts.

71. Due to Plaintiff's union membership status with AEA and the rights and benefits conferred upon Plaintiff by virtue of her union membership, a unique, fiduciary relationship existed between AEA and Plaintiff. Acting in its fiduciary capacity AEA promised it would provide Plaintiff with assistance, legal and otherwise, to seek redress against the Anchorage School District's wrongful acts, to the fullest extent provided by law.

72. Plaintiff relied upon her union membership status with AEA and AEA's representations to her as a union member.

73. Plaintiff informed AEA of the District's acts as alleged, and pursuant to their instruction(s), provided AEA's attorney, John Patterson, with a factual account of Anchorage School District's refusal to provide Plaintiff with access to employment, refusal to provide her with a teaching contact, [sic] and other false promises and misrepresentations as alleged.

74. AEA and John Patterson ignored their fiduciary duty owed to Plaintiff and acted with intent and with conscious disregard of Plaintiff's known rights to give Plaintiff legal advise which was counter to Plaintiff's legal rights. The misinformation provided to Plaintiff was/is contained in direct communication and in writings, and regards her rights to employment with Anchorage School District.

75. By acting as alleged AEA and John Patterson intended to cause, and in fact caused, Plaintiff to believe that AEA refused to provide her with rights and benefits conferred upon Plaintiff by virtue of her union membership.

76. Plaintiff is informed and believes and thereon alleges that by acting as alleged, AEA and John Patterson intentionally sought to achieve the wrongful purpose of eliminating or greatly reducing AEA's, John Patterson's, and the Anchorage School District's exposure to liability for their acts,past and contemporary, which wrongfully deprive Plaintiff of her tenured employment rights under law.

77. Plaintiff was ignorant of the true facts, and despite the exercise of due diligence on her part, she was not aware of, nor could she discover the true fact that Anchorage School District planned to refuse her access to employment, or of the true fact of the District's secret intention not to reinstate Plaintiff, or of the true fact of AEA and/or John Patterson's secret intention to refuse assistance and deprive her of the rights and benefits to which she was entitled by virtue of her union membership.

78. As a direct and proximate result of the Defendant's individual and collective fraud and deceit upon the facts herein alleged, Defendants have wrongfully deprived Plaintiff of a tenured position of employment as a teacher with all of the rights and benefits appurtenant, and have caused Plaintiff to suffer severe emotional stress and distress and monetary damages.

79. In doing the acts herein alleged Defendants, and each of them, acted intentionally, oppressively, maliciously, fraudulently, and outrageously toward Plaintiff, with conscious disregard of her known rights, and with the intent of causing, or in willfully disregard of the probability of causing unjust and cruel hardship to Plaintiff and her family. In so acting, Defendants, and each of them, intended to and did vex, injure, and annoy Plaintiff, creating in Plaintiff the right to punitive damages.

SEVENTH CAUSE OF ACTION:
BREACH OF CONTRACT
(AEA and John Patterson)

80. Plaintiff refers to and realleges Paragraphs 1 through 14 and Paragraphs 15 through 79 of the First through Sixth Causes of Action, and incorporates the same herein as though fully set forth.

81. On or about August 1983 in Anchorage, Alaska after Plaintiff's employment with Anchorage School District had begun, she entered into a partly written and partly oral membership contract with AEA.

82. AEA provided consideration in the form of promises made to Plaintiff to:

(a) Represent Plaintiff's interests and act as her representative in the event of a dispute with the Anchorage School District, and

(b) Provide direct representation and certain other express membership benefits to Plaintiff

83. Plaintiff provided consideration in the form of payments to AEA of union membership dues assessed at

regular intervals, and in the form of her return promises to use AEA's services in the event of a dispute with Anchorage School District.

84. Anchorage School District subsequently terminated Plaintiff's employment as alleged. Plaintiff contacted AEA and requested their representation to secure reinstatement.

85. On or about July 27, 1989, AEA retained and employed Defendant John Patterson to represent Plaintiff as Plaintiff's attorney, and to file and pursue a legal action against Anchorage School District seeking to reinstate Plaintiff's employment and for civil contract and tort damages arising out of the 1989 termination of Plaintiff's employment. At such time and place Defendant, John Patterson accepted such employment and agreed to perform such services for Plaintiff, who was the intended third party beneficiary of the contract between AEA and John Patterson as identified in this paragraph.

86. On or about August 31, 1992, Plaintiff became aware that AEA breached their contract with Plaintiff by their failure to act on Plaintiff's requests, and in her behalf, to secure the benefits of Anchorage School District's asserted, but false, full reinstatement to her prior tenured position of employment.

87. Implied in the Plaintiff's contract with AEA is the duty of each of the parties to deal honestly, fairly, and in good faith with each other party to the contract in all matters arising from the contractual relationship.

88. Plaintiff has performed all things necessary on Plaintiff's part to be performed under her contract with the AEA.

89. As a result of AEA's and John Patterson's breach(s) of contract(s), Plaintiff has not received the contractual benefit of services for which she bargained and was entitled to receive.

90. As a result of AEA's and their employee and agent John Patterson's breach of contract, Plaintiff has incurred general damages of an amount presently unknown to Plaintiff, but subject to determination during discovery, and consisting of dues payments made to AEA to secure membership and membership services.

91. At the time Plaintiff and AEA entered into the contract it was foreseeable that as a result of a breach of contract by AEA or AEA's agents or employees, that Plaintiff would incur special damages arising from the inability to receive compensation for her teaching services at Anchorage School District.

92. At the time Plaintiff and AEA entered into the contract it was foreseeable that as a result of a breach of contract by AEA or AEA's agents or employees, that Plaintiff would incur special damages arising from, but not limited to, expenses incurred as a result of losing the tenured employment, a substantial reduction in earning capacity, the inability to secure equivalent substitute employment in the area of her residence, plus other special damages in amounts to be determined through discovery and proven at trial, and within the jurisdiction of this court.

EIGHTH CAUSE OF ACTION: NEGLIGENCE
(AEA and John Patterson)

93. Plaintiff refers to and realleges Paragraphs 1 through 14 and Paragraphs 15 through 92 of the First through Seventh Causes of Action, and incorporates the same herein as though fully set forth.

94. As alleged herein and above and at such time and place as Defendant, John Patterson accepted employment and agreed to perform legal services on Plaintiff's behalf, a legal duty was created on behalf of John Patterson to exercise due care as a attorney to protect the legal rights of the Plaintiff, and to act in a reasonable manner to initiate and pursue any and all claims, causes of action, or remedies which existed to redress all injuries to Plaintiff arising from Anchorage School District's involuntary termination of Plaintiff.

95. As alleged herein and above and at such time and place as Defendant AEA acted to hire attorney services for Plaintiff's benefit, a special duty was created on behalf of AEA to exercise due care in hiring, and in supervision of their employee and agent, attorney John Patterson, and to otherwise continue to act in a reasonable manner to pursue Plaintiff's legal rights and available remedies against Anchorage School District.

96. At all times thereafter John Patterson failed to exercise the skill, diligence, and prudence of an attorney in the course of professional employment in undertaking to perform such legal services for Plaintiff, and negligently and carelessly failed to diligently act to protect the rights and remedies provided by law to the Plaintiff.

97. At all times thereafter AEA failed to act in a reasonable manner to supervise John Patterson's conduct in the course of professional employment while undertaking to perform legal services for Plaintiff, and negligently and carelessly failed to diligently act to protect the rights and remedies provided by law to the Plaintiff.

98. Had the Defendants, and each of them, exercised proper care and skill in the foregoing matter, actions or claims against Anchorage School District, Plaintiff would not have incurred the loss of her legal right to continue her tenured employment with the District, compensation for her employment and all benefits appurtenant, and damages at law and in equity resulting from Anchorage School District's termination(s) of Plaintiff's employment.

99. As a direct and proximate result of the Defendants' failure to utilize the requisite degree of care on Plaintiff's behalf, Plaintiff has suffered the loss of her legal right to continue her tenured employment with the District, compensation for her employment and all benefits appurtenant, and reimbursement for civil contract and tort damages suffered by the Plaintiff. Plaintiff has suffered and continues to suffer severe emotional injury, manifest by irritability, loss of sleep, increased frequency in number and intensity of headaches, upset stomachs and other emotionally related physical symptoms.

100. Plaintiff has been injured by the Defendants' failure to exercise proper care, and Defendants and each of them owe to Plaintiff compensatory damages in the amount to be determined during discovery and proven at trial.

101. Plaintiff has at all times exercised reasonable and ordinary care, caution, and prudence to avoid the injuries as alleged, and is free of any contributory fault leading to her injuries.

NINTH CAUSE OF ACTION: BREACH OF CONTRACT
(Chancey Croft)

102. Plaintiff refers to and realleges Paragraphs 1 through 14 and all facts alleged in Paragraphs 15 through 101 of the First through Eighth Causes of Action, and incorporates the same herein as though fully set forth.

103. On or about May 13, 1988, Plaintiff learned that Anchorage School District denied ("controverted") worker's compensation benefits for health care coverage to pay for the cost of medical treatment for the spinal injuries she sustained in the work related accident of January 7, 1987.

104. On or about July 6, 1988, at Anchorage, Alaska, Plaintiff contacted Defendant Chancey Croft for assistance to secure worker's compensation benefits and payment for her medical treatment. Chancey Croft offered to furnish labor and services to represent Plaintiff as Plaintiff's attorney at law and prosecute all actions or claims at law or in equity arising from Anchorage School District's denial of worker's compensation, medical care reimbursement, and disability benefits.

105. Chancey Croft provided Plaintiff with a written retainer agreement which Plaintiff signed and dated. A true and accurate copy of the retainer agreement is attached hereto as Exhibit "B," as in incorporated herein by this reference as though fully set forth.

106. Plaintiff accepted the terms contained in Exhibit B, and she provided consideration in the form of promises to pay "out-of-pocket" legal costs as the costs were incurred and for other good and valuable consideration.

107. Chancey Croft provided consideration in the form of his return promises to competently perform legal services on Plaintiff's behalf, provide Plaintiff with copies of all papers, forms, and letters generated by Chancy Croft's law offices on Plaintiff's behalf, and communicate with Plaintiff in a prompt manner.

108. Chancey Croft further represented to Plaintiff that he would thereafter begin return performance and he in fact began performance of the above mentioned labor and services.

109. Chancey Croft failed to perform his obligations under the contract in that Chancey Croft formally withdrew his legal representation of Plaintiff on at least three occasions, without just cause and without prior notice to Plaintiff of any kind.

110. Each withdrawal resulted in prejudice to Plaintiff's legal rights to worker's compensation and disability benefits due Plaintiff from Anchorage School District and each withdrawal was without Plaintiff's authorization or prior knowledge.

111. Plaintiff has performed all things necessary on Plaintiff's part to be performed under the contract with Chancey Croft.

112. Plaintiff has suffered damages due to prejudice to her legal rights to worker's compensation, reimbursement for health care expenses, and disability benefits from Anchorage School District.

113. As a result of Chancey Croft's breach of contract, Plaintiff has not received the contractual benefit of legal services which she bargained for and was entitled to receive.

114. As a result of Chancey Croft's breach of contract, Plaintiff has incurred general and consequential contract damages in an amount to be established according to proof at trial.

115. As a result of Chancey Croft's breach of contract, Plaintiff has suffered special damages in the form of interest and/or lost opportunity to realize profit upon investment of the money damages if same had been properly pursued and collected for Plaintiff. Plaintiff's special damages were foreseeable at the time the parties entered into the legal services contract.

TENTH CAUSE OF ACTION: INTENTIONAL MISREPRESENTATION OF FACT
(Chancey Croft)

116. Plaintiff refers to and realleges Paragraphs 1 through 14 and all facts alleged in Paragraphs 15 through 115 of the First through Ninth Causes of Action, and incorporates the same herein as though fully set forth.

117. On or about April 4, 1990, Chancey Croft informed Plaintiff that he has been successful in his efforts on Plaintiff's behalf and that Anchorage School

District had agreed to reimburse more than ninety-seven thousand dollars ($97,000.00) of Plaintiff's medical expenses.

118. Chancey Croft also informed Plaintiff that Alaska law provided for, and that she was entitled to, additional sums of money from Anchorage School District for reimbursement of medical expenses and for interest and penalty on the amount of compensation for medical expenses that had previously been wrongfully withheld from the Plaintiff. Further, Chancey Croft told Plaintiff that he would continue his efforts on her behalf to collect all amounts due Plaintiff, and that by his calculations the interest and penalty amounts then due exceeded thirty-five thousand dollars ($35,000.00).

119. Plaintiff believed Chancey Croft's representations to her as alleged and relied upon the representations to her detriment in that she took no further action to hire other legal counsel or otherwise act to secure her rights to payment of further reimbursement of medical expenses and of the interest and penalty amounts from Anchorage School District.

120. On or after April 4, 1990, Plaintiff attempted to contact Chancey Croft on numerous occasions. The attempted contacts were made by telephone and by letters of correspondence.

121. On or after April 4, 1990, nearly all of Plaintiff's attempts to contact Chancey Croft were futile in that her telephone calls and letters of correspondence to Chancey Croft went unanswered, and Plaintiff was denied information as to the status of her legal action against Anchorage School District.

122. On or after April 4, 1990, on the limited occasions when Chancey Croft did respond to Plaintiff's inquiries, he told Plaintiff that he was pursuing all necessary actions on her behalf to seek to collect reimbursement for Plaintiff's medical expenses and the interest and penalty amounts from Anchorage School District.

123. Plaintiff is informed and believes and thereon alleges that at the times Chancey Croft told her that he was pursuing action(s) on her behalf, he was in fact doing nothing to pursue collection, and that he hid from Plaintiff his secret intention to do nothing further on her behalf.

124. By acting as alleged Chancey Croft intended to cause, and in fact caused, Plaintiff to believe that he was pursuing all necessary actions on her behalf to seek to collect reimbursement for Plaintiff's medical expenses and the interest and penalty amounts from Anchorage School District.

125. Plaintiff was ignorant of the true facts, and despite the exercise of due diligence on her part, she was not aware of, nor could she discover the true fact of Chancey Croft's secret intention not to undertake any further action on Plaintiff's behalf.

126. As a direct and proximate result of Chancey Croft's fraud and deceit upon the facts herein alleged, Plaintiff has been deprived of reimbursement of medical expenses and interest and penalty amounts to which she was entitled to receive, and further, Plaintiff has suffered monetary and emotional damages as a result.

127. In doing the acts herein alleged Chancey Croft acted intentionally, oppressively, maliciously, fraudulently, and outrageously toward Plaintiff, with conscious disregard of her known rights, and with the intent of causing, or in willfully disregard of the probability of causing injust and cruel hardship to Plaintiff and her family. In so acting, Chancey Croft intended to and did vex, injure, and annoy Plaintiff, creating in Plaintiff the right to punitive damages.

ELEVENTH CAUSE OF ACTION: NEGLIGENCE
(Chancey Croft)

128. Plaintiff refers to and realleges Paragraphs 1 through 14 and all facts alleged in Paragraphs 15 through 127 of the First through Tenth Causes of Action, and incorporates the same herein as though fully set forth.

129. The legal services contract between Chancey Croft and the Plaintiff, created a duty at law in Chancey Croft to exercise due care and skill as an attorney to protect the legal rights of the Plaintiff, and to act in a reasonable manner to initiate and prosecute any and all claims, causes of action, or remedies which existed pursuant to Alaska's laws in order to redress the injuries Plaintiff suffered.

130. At all times thereafter Chancey Croft failed to exercise the skill, diligence, and prudence of an attorney in the course of professional employment in undertaking to perform such legal services for Plaintiff, and negligently and carelessly failed to diligently act to protect the rights and remedies provided by law to the Plaintiff.

131. Plaintiff is informed and believes and thereon alleges that her claims were at all times herein mentioned meritorious and that Plaintiff would have prevailed in a judgment against Anchorage School District had an action been pursued in a court of competent jurisdiction for:

(a) reimbursement of Plaintiff's unpaid medical expenses in an amount in excess of twelve thousand dollars ($12,000.00),

(b) interest and penalty on the paid and unpaid medical expenses in an amount in excess of thirty-five thousand dollars ($35,000.00), and

(c) reimbursement for Plaintiff's partial disability in an amount according to proof at trial.

132. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned Anchorage School District was solvent with sufficient assets and property to satisfy a judgment in such amount.

133. Had Chancey Croft exercised proper care and skill in the foregoing matter, Plaintiff's actions or claims against Anchorage School District would have been pursued in a prudent and diligent manner, free from unannounced and unauthorized withdrawals of legal representation by Chancey Croft and said actions would have been timely brought within the applicable Alaska statute of limitations period.

134. Chancey Croft failed to exercise proper care and skill either to act to preserve Plaintiff's rights, or to inform Plaintiff of the statutory period limiting the time

within which legal action to recover the interest and penalty must be initiated.

135. On or about September 8, 1992, Plaintiff discovered that Chancey Croft had breached his legal duty to her and failed to act to pursue and to preserve any and all claims or causes of action.

136. As a direct and proximate result of Chancey Croft's failure to use due care as Plaintiff's attorney including, but not limited to, Chancey Croft's failure to meet the time deadline(s) for pursuing Plaintiff's claims and/or initiating new legal action within the applicable statute of limitations, Plaintiff has been damaged through the loss of her legal right to compensation and reimbursement for medical expenses, penalty and interest amounts, and permanent partial disability, and Chancey Croft owes Plaintiff compensatory damage in the sum to be proven at trial and within the jurisdictional limits of this court.

137. As a direct and proximate result of the Chancey Croft's failure to utilize proper care, Plaintiff has suffered and continues to suffer severe emotional injury, manifest by irritability, loss of sleep, increased frequency in number and intensity of headaches, upset stomachs and other emotionally related physical symptoms.

138. Plaintiff has at all times exercised reasonable and ordinary care, caution, and prudence to avoid the injuries herein alleged, and is free of any contributory fault leading to the herein alleged injuries.

TWELFTH CAUSE OF ACTION: CONVERSION
(Chancey Croft)

139. Plaintiff refers to and realleges Paragraphs 1 through 14 and all facts alleged in Paragraphs 15 through 138 of the First through Eleventh Causes of Action, and incorporates the same herein as though fully set forth.

140. On or about January 7, 1992, Plaintiff mailed to Chancey Croft a personal check in the amount of three hundred and twelve dollars and thirty cents ($312.30) payable to Chancey Croft.

141. Plaintiff tendered the check to Chancey Croft upon his request and for the sole purpose of paying for a copy of the transcript of the worker's compensation hearing to Plaintiff's case. Plaintiff's personal check contains the following notation on the memo line:

"transcript of worker's comp. hearing."

142. On or about January 13, 1992, Chancey Croft cashed Plaintiff's check.

143. Subsequent to January 7, 1992, Plaintiff made numerous verbal and written requests for a copy of the transcript.

144. Plaintiff never received a copy of the transcript of the worker's compensation hearing.

145. On or after September 8, 1992, after Plaintiff learned that Chancey Croft had again withdrawn from representing her interests, Plaintiff demanded return of the $312.30 from Chancey Croft.

146. Chancey Croft refused to return the amount of $312.30 to Plaintiff.

147. Plaintiff has a lawful right to possession of the full amount of $312.30.

148. Chancey Croft has interfered with Plaintiff's right to possession, dominion, and control of the $312.30.

149. At the time Chancey Croft interfered with Plaintiff's right to possession, and at all times thereafter, Chancey Croft had knowledge of Plaintiff's right to possess the full amount tendered, but acted in disregard of its knowledge and deprived and wrongfully dispossessed Plaintiff of $312.30.

150. Plaintiff is damaged by Chancey Croft's interference with Plaintiff's right to possession, dominion, and control of $312.30, in the amount stated plus interest at the maximum percentage rate allowed by law.

THIRTEENTH CAUSE OF ACTION: CONSPIRACY
(Anchorage School District, AEA, and John Patterson)

151. Plaintiff refers to and realleges Paragraphs 1 through 14 and all facts alleged in Paragraphs 15 through 150 of the First through Twelfth Causes of Action, and incorporates the same herein as though fully set forth.

152. In acting as alleged herein, Defendants Anchorage School District, AEA, and John Patterson intentionally participated in acts designed to cover-up Defendant Anchorage School District's improper acts. Specifically, Defendants and each of them, communicated to Plaintiff in writing that Plaintiff's employment was being terminated in 1992 for the stated, but false, assertion that Plaintiff has refused to return to work.

153. Plaintiff moved back to Anchorage, Alaska, and was physically present, ready, willing, and able to begin work on the day and date, and at the location specified by Anchorage School District (West High School).

154. Anchorage School District prevented Plaintiff from working by withholding teaching materials, books, course assignments, and etcetera, which were necessary in order to prepare to teach a high school class, and by refusing to offer her a contract of employment.

155. In acting as alleged herein, Anchorage School District, AEA, and John Patterson conspired with each other to commit the tortious conduct alleged herein and by reason of the conspiracy and concerted efforts by these Defendants and each of them have deprived Plaintiff of her right to tenured employment including all rights and benefits appurtenant, and have inflicted upon Plaintiff severe emotional stress and distress as alleged. Accordingly, Anchorage School District, AEA, and John Patterson are liable jointly and separately to Plaintiff.

156. In doing the acts herein alleged Defendants and each of them acted intentionally, oppressively, maliciously, fraudulently, and outrageously toward Plaintiff, with conscious disregard of her known rights, and with the intent of causing, or in willfully disregard of the probability of causing unjust and cruel hardship to Plaintiff and her family. In so acting, Defendants intended to and did vex, injure, and annoy Plaintiff, creating in Plaintiff the right to punitive damages.

FOURTEENTH CAUSE OF ACTION: CONSPIRACY
(Anchorage School District AND Chancey Croft)

157. Plaintiff refers to and realleges Paragraphs 14 and Paragraphs 15 through 156 of the First through Thirteenth Causes of Action, and incorporates the same herein as though fully set forth.

158. Pursuant to a written stipulation between Anchorage School District and Chancey Croft, attorney's fees in the amount of eleven thousand dollars were paid to Chancey Croft by the District.

159. Plaintiff is informed and believes and thereon alleges that in connection with Anchorage School District's payment of Chancey Croft's attorney's fees, Anchorage School District and Chancey Croft entered into a secret promise that Chancey Croft would not to pursue further action against Anchorage School District on behalf of Plaintiff.

160. In acting as alleged, Anchorage School District and Chancey Croft conspired with each other to commit the tortious conduct as alleged and by reason of the conspiracy and concerted efforts by these Defendants and each of them inflicted severe emotional distress upon Plaintiff and deprived Plaintiff of reimbursement for medical expenses and interest and penalty as provided by law. Accordingly, Anchorage School District and Chancey Croft are liable jointly and separately to Plaintiff.

161. In doing the acts herein alleged Defendants and each of them acted intentionally, oppressively, maliciously, fraudulently, and outrageously toward Plaintiff, with conscious disregard of her known rights, and with the intent of causing, or in willfully disregard of the

probability of causing unjust and cruel hardship to Plaintiff and her family. In so acting, Defendants intended to and did vex, injure, and annoy Plaintiff, creating in Plaintiff the right to punitive damages.

FIFTEENTH CAUSE OF ACTION: NEGLIGENT OR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
(All Defendants)

162. Plaintiff refers to and realleges Paragraphs 1 through 14 and Paragraphs 15 through 161 of the First through Fourteenth Causes of Action, and incorporates the same herein as though fully set forth.

163. Defendants engaged in the conduct as alleged after gaining knowledge of facts specific to Plaintiff's injuries, related physical impairment, and resulting weakened physical and mental state. Defendant's knowledge of the facts regarding Plaintiff's impairment caused their actions under the special circumstances of this case to be outrageous, egregious, and grossly unreasonable.

164. In acting as alleged Defendants intentionally or negligently inflicted severe emotional distress upon Plaintiff or acted with conscious disregard for Plaintiff's known rights and thereby carelessly or intentionally inflicted severe emotional distress upon Plaintiff.

165. Defendants and each of them knew, or should have known by virtue of their respective relationships with Plaintiff, that Plaintiff's physical and mental capability was diminished through the severe spinal trauma accident injuries she sustained, and that as a result of the

accident injuries Plaintiff's physical and emotional condition was weakened thereby rendering her more vulnerable to abuse of her rights by Defendants.

166. In doing the acts herein alleged Defendants and each of them acted intentionally, oppressively, maliciously, fraudulently, and outrageously toward Plaintiff, with conscious disregard of Plaintiff's unique vulnerability and weakened state and of her known rights, and with the intent of causing, or in willfully disregard of the probability of causing unjust and cruel hardship to Plaintiff and her family. In so acting, Defendants intended to and did vex, injure, and annoy Plaintiff, creating in Plaintiff the right to punitive damages.

WHEREFORE, Plaintiff prays judgment against Defendants, and each of them, as follows:

A. For Plaintiff's First, Second, Fourth, Sixth, Tenth, Thirteenth, Fourteenth, and Fifteenth Causes of Action:

1. For general and compensatory damages according to proof;
2. For special damages according to proof;
3. For an assessment of punitive damages according to proof;
4. For costs of suit incurred herein; and
5. For such other and further relief as the court may deem just and proper.

B. For Plaintiff's Third Case of Action:

1. For general and compensatory damages according to proof;

2. For special damages according to proof;

3. For costs of suit incurred herein;

4. For attorney's fees and costs as provided by statute; and,

5. For such other and further relief as the court may deem just and proper.

C. For Plaintiff's Fifth, Seventh, Eighth, Ninth, Eleventh, and Twelfth Causes of Action:

1. For general and compensatory damages according to proof;

2. For special damages according to proof;

3. For costs of suit incurred herein; and

4. For such other and further relief as the court may deem just and proper.

Dated: August 24, 1994

/s/ Sherry L. McGinnis
Sherry L. McGinnis

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury as provided by Rule 38(a) of the Federal Rules of Civil Procedure.

Dated: August 24, 1994

/s/ Sherry L. McGinnis
Sherry L. McGinnis

APPENDIX B

Joe P. Josephson
Attorney for Anchorage
Education Association
Josephson & Blair, P. C.
880 H Street, Suite 205
Anchorage, Alaska 99501

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

SHERRY L. McGINNIS,
Plaintiff,
vs.
ANCHORAGE SCHOOL DISTRICT, et al.,
Defendants.

Case No. A-94-385 Civil (JWS)

AFFIDAVIT OF ELIZABETH S. O'LEARY

UNITED STATES OF AMERICA)
) ss.
THIRD JUDICIAL DISTRICT)

ELIZABETH S. O'LEARY, being first duly sworn, upon her oath, deposes and says:

1. I am an attorney at law employed presently by the United States Department of Justice, as an Assistant United States Attorney for the District of Alaska.

2. Before going to law school at Golden Gate University School of Law in San Francisco, California, I worked for nine years as a teacher. During that period, I became active in the teachers' union activities, including serving as an elected representative of the Anchorage Education Association (AEA) at conventions of its state affiliate, NEA-Alaska, Inc.

3. After graduation from law school, and admission to the Alaska Bar in 1983, I secured employment with the law firm of Kay, Christie, Saville and Coffey, and with the law firm of Gianinni and Vallentine, in Anchorage.

4. In 1987, I became a "Uniserv" Director for NEA-Alaska, Inc., the state affiliate of National Education Association (NEA) for Alaska's local teachers' unions, including the Anchorage Education Association (AEA). I worked in that capacity until 1991, when I became an Assistant United States Attorney.

5. I was a Uniserv Director for NEA-Alaska, Inc., assigned to assist its Anchorage affiliate in 1989 and 1990. during that period of time, I had dealings with the plaintiff, Sherry L. McGinnis. At that time, and throughout my service, I reported to NEA-Alaska, Inc.'s executive director, Mr. Robert Manners, and its Board of Directors. I was never supervised or evaluated in my work by any officer or employee of AEA or by AEA's Board of Directors. All my pay checks were drawn upon an account of NEA-Alaska, Inc.; at no time was I paid any wage or salary by AEA.

6. On June 19, 1989, Ms. McGinnis met with me and told me she had been terminated in April of that year by

the Anchorage School District. She wanted AEA's assistance to be reinstated as a teacher with the school district.

7. Ms. McGinnis explained her delay in contacting AEA by saying that she did not get the help she was seeking in 1987, in connection with her grievance against her building principal. I advised her as to what options were available under the terms of the collective bargaining agreement then in effect between AEA and the Anchorage School District. These options included filing a grievance or filing a lawsuit. Ms. McGinnis was displeased that I did not recommend that AEA file a grievance for her. Her displeasure was made manifest by her correspondence to NEA-Alaska, dated July10, 1989, a copy of which is attached as Exhibit "A" hereto. It is noted that the correspondence of July 10, 1989, was addressed to "NEA-Alaska", and to the attention of "Elizabeth S. O'Leary, Field Staff."

8. On July 27, 1989, I wrote to Mr. Ed Lindquist, Director of Personnel, Anchorage School District, on behalf of Ms. McGinnis. A copy of that letter is attached to this affidavit and marked as Exhibit "B" hereto.

9. The decision whether to assist a terminated or dismissed teacher was the responsibility of the NEA-Alaska Board of Directors, on the advice of the executive director. The decision whether to provide the assistance was never the function of AEA or any of its sub-units, officers, or bodies, and was not made by me.

10. In this case, NEA-Alaska, Inc. decided to assist the plaintiff and engaged John Paterson to represent her.

11. I had prior dealings with Mr. Patterson on many occasions in my work. We had dealings in dismissal and termination situations, and grievance arbitrations. Mr. Patterson was available to me and other staff members as a general consultant on legal matters. Although Mr. Patterson was not engaged by me to assist the plaintiff, or by any AEA officer or body, I was not surprised or at all displeased by his engagement. I knew Mr. Patterson to be a competent and knowledgeable practitioner in the area of employment law in the public education sector. The judgment I formed in that respect is one I consider to be an informed one, because of my long union experience, my background as a public school educator, my training and work as an attorney and my observations and experience as a Uniserv director.

12. In my conversations with her, Ms. McGinnis never talked about damages being sought from the Anchorage School District. She did tell me that she planned to go to law school, and had either taken or was soon to take the LSAT in conjunction with the law school admissions process.

13. I did not participate in any "conspiracy" affecting, or intended to affect, Ms. McGinnis, either with the Anchorage School District or with Chancy Croft. To the best of my knowledge I had no contact with Mr. Croft at all, unless there was a call to him just to find out the status of the worker's compensation claim his office was handling for Ms. McGinnis.

14. It was not my job, nor the job of anyone employed by AEA or in any elected office of that organization to "supervise" John Patterson in his work on

behalf of Ms. McGinnis. Mr. Patterson did not report to me or to AEA regarding that work, and was not expected to do so.

DATED at Anchorage, Alaska, this 14 day of September, 1995.

/s/ Elizabeth S. O'Leary
ELIZABETH S. O'LEARY

SUBSCRIBED and sworn to before me, a Notary Public in and for Alaska, this 14 day of September, 1995.

/s/ Mary Ann Woodward
My commission expires:
9/31/96

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

SHERRY L. McGINNIS, Plaintiff, vs. ANCHORAGE SCHOOL DISTRICT, et al., Defendants.	Case No. 94-385 Civil (JWS)

AFFIDAVIT OF MARK JONES

UNITED STATES OF AMERICA)
) ss.
STATE OF ALASKA)

MARK JONES, being first duly sworn, deposes and says:

1. *Affiant's Work.* I work in Anchorage, at the offices on Bragaw Street where the Anchorage Education Association ("AEA") has its headquarters and the local office of NEA-Alaska, Inc., is sited. I am a "Uniserv Director", and a principal task of mine within my job description is to assist the AEA and its members.

2. *Affiant Not Paid or Supervised by AEA.* I am not paid by the AEA. I have never been paid by the AEA. I

am not evaluated or supervised by any officer of the AEA or its Board of Directors.

3. *NEA-Alaska, Inc; Relation to AEA; Supervision of of* [sic] *Uniserv Directors; AEA's Autonomy.*

NEA-Alaska, Inc. is a different entity than the AEA. It is incorporated in Alaska, and it is affiliated with the AEA. One aspect of this affiliation is that is provides services to the AEA, such as the assignment of Uniserv officers to assist in Anchorage. Uniserv Directors are supervised by the Executive Director of NEA-Alaska, Inc., and responsible to the Board of Directors of NEA-Alaska, Inc. The relationship between NEA-Alaska, Inc., and the AEA is not that of a principal corporation and a subsidiary. NEA-Alaska, Inc. does not own any part of the AEA. The AEA members locally elect the AEA officers.

4. *Teacher Dismissal; Role of NEA-Alaska, Inc.*

When a teacher goes to the AEA with a dismissal problem the matter is referred to the Executive Director of NEA-Alaska, Inc. At the time Sherry McGinnis was dealing with the AEA and me the Executive Director was Mr. Robert Manners. It is the responsibility of the Executive Director to consider the information or report given by the local Uniserv Director and to advise NEA-Alaska, Inc.'s Board of Directors whether NEA-Alaska, Inc. should provide assistance.

5. *Affiant Employed & Paid by NEA-Alaska, Inc., Not AEA.*

All Uniserv directors, such as myself and, formerly, Elizabeth ("Betsy") O'Leary are employees of NEA-Alaska,

Inc., not the local affiliate. We are paid by NEA-Alaska, Inc., not by the AEA.

6. *Dealing with Plaintiff: Her Departure from the High School.*

I understand that Ms. McGinnis complains as to me that I refused to assist her. My dealings with Ms. McGinnis were in 1992. It was reported to me that Ms. McGinnis reported to West High School on Tuesday, August 25, 1992. When she discovered that a written contract was not waiting for her there, in the school building, she departed from the school premises.

7. *Advice Given to Plaintiff; Exhibit "F".* On the following day, when we learned of her conduct for the first time, both her attorney, John Patterson, and I, notified her that her action was an inappropriate response to the Anchorage School District's failure to have the written contract at the school. Mr. Patterson and I counseled Ms. McGinnis to return to work, but she did not take our advice, as far as I am aware. My correspondence of August 31, 1992, to the plaintiff recites these facts, and is attached to AEA's Memorandum in Support of its Motion for Summary Judgment as Exhibit "F".

8. *Contacts with Ed Lindquist; Report to Ms. McGinnis.* As stated in Exhibit "F", I also contacted Mr. Ed Lindquist, the District's Executive Director of Personnel to obtain the written contract which Ms. McGinnis had requested. Dr. Lindquist told me that before Ms. McGinnis could return to work, a conference would be necessary to take up her exchange with the school principal, whose directive to work she disregarded, and her unexcused absence from her duty station at West High

School. I reported this conversation to the plaintiff, who responded to the effect that it was something we would need to talk about at a later date. We never did.

9. (a). *Warnings Given Plaintiff; Notice to Plaintiff of Affiant's Efforts (Exhibit "G").*

My correspondence of August 31 to the plaintiff (Exhibit "F") included my warnings to her that she was risking "further disciplinary action" and "further conflicts with the district". I pointed out that I had also spoken twice with Dr. Lindquist, and written to him (Exhibit "G") about two checks, totalling $2,760.21, which Ms. McGinnis wanted to have reissued, plus compensation for lost pay or work time resulting from her discharge in 1989. I also noted that Ms. McGinnis's failure to furnish AEA with her current telephone number, and her failure to tell the District her "whereabouts and/or intentions regarding . . . continued employment" was making very difficult any efforts to "address" her "remaining issues", and could "force the District to take further action(s) against" her. I received no response from the plaintiff.

(b). *Correspondence of September 3, 1992 (Exhibit H).*

I also communicated with the plaintiff on September 3, 1992. Being cognizant that the District had sent a letter of termination, I wished in my letter of September 3 to alert Ms. McGinnis to her statutory rights, procedurally, and the deadline for her to request a hearing. I wrote in pertinent part:

> "I would encourage you to exercise your right to that hearing as soon as possible. If you would prefer, advise the Association of your desire to

> have a hearing so that we might request that hearing on your behalf. The Association can only act on your behalf if you notify us of your wishes in this matter. Once again I would request a current phone number which would allow the Association to make direct contact with you and permit us to effectively represent you."

(Exhibit "H").

Ms. McGinnis never responded. On information and belief, she disregarded the administrative process available to her and never sought a hearing before the School Board.

10. *John Patterson, Esq.* Over the course of many years of service in Anchorage, I have dealt with John Patterson, Esquire, because NEA-Alaska, Inc. has during that time used him often in grievance, dismissal, and other legal matters. I have come to respect Mr. Patterson for his expertise in public employment matters and his zealous advocacy on behalf of aggrieved, nonretained, or dismissed school employees. While I was not privy to the selection of Mr. Patterson as Ms. McGinnis's lawyer in connection with her termination in 1989, I am not at all surprised that NEA-Alaska, Inc. would have engaged him. Given his expertise and experience, and record of success in dealing with teacher problems, Mr. Patterson was an obvious and natural choice. The selection of Mr. Patterson would have been made by NEA-Alaska, Inc., and not by AEA. Mr. Patterson is not an employee of NEA-Alaska, Inc.; he does now maintain and has at all times pertinent maintained, an independent law practice in Anchorage.

11. *No Conspiracy.* I have never been involved in any "conspiracy" to injure Ms. McGinnis. On the contrary, I tried to assist her in every appropriate way, under the circumstances.

12. *AEA and Uniserv Directors Do Not "Supervise" Attorneys Engaged by NEA-Alaska, Inc; AEA Did Not Pay John Petterson* [sic].

When NEA-Alaska, Inc. engages an attorney for a school employee, neither the AEA nor any Uniserv director becomes that attorney's "supervisor".

Mr. Patterson was not paid by the AEA. He was paid by NEA-Alaska, Inc., which selected him to represent Ms. McGinnis. The AEA does not select or pay lawyers who represent teachers.

FURTHER AFFIANT SAYETH NOT.

DATED September 15, 1995, at Anchorage, Alaska.

/s/ Mark L. Jones
MARK JONES, Affiant

SUBSCRIBED and sworn to before me, a Notary Public in an for Alaska, this 15th day of September, 1995.

/s/ Joseph Josephson
My commission
expires: 6-27-9? (illegible)

APPENDIX D

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

SHERRY L. McGINNIS, Plaintiff, vs. ANCHORAGE SCHOOL DISTRICT, Defendant.	)	Case No. 3AN-89-___ Civil

COMPLAINT

For her complaint, plaintiff says:

1. Plaintiff is certificated as a school teacher in Alaska (A.S. 14.20.010) and was so certificated at all times relevant to this action.

2. Plaintiff was first employed as a certificated teacher by Anchorage School District (ASD) in August 8, 1983, for the school year. She worked for ASD as a teacher until at least January 9, 1989.

3. On January 7, 1988, Sherry McGinnis claimed to suffer an injury to her back related to her employment.

4. She remained away from active teaching for ASD for substantially the remainder of the 1987-1988 school year. Plaintiff is informed and believes and so alleges that in the winter and spring of 1988 ASD considered Ms.

McGinnis to have available to her workers' compensation benefits.

5. In August 1988, plaintiff was issued a contract by ASD as a certificated employee for the 1988-1989 school year. Exhibit A is a true and correct copy of that contract.

6. Ms. McGinnis was a teacher who had obtained tenure under A.S. 14.20 prior to the 1988-1989 school year.

7. She claimed that the outset of the 1988-1989 school year she remained unable to return to work as a classroom teacher and informed ASD she was scheduled for surgery.

8. She had, in June 1988, so informed ASD by Exhibit B.

9. By document dated August 10, 1988, ASD controverted plaintiff's workers' compensation claim. Exhibit C is a true and correct copy of the controversion document.

10. The timing of ASD's controversion of liability under workers' compensation for surgery costs for the surgery scheduled in August 1988 left plaintiff without an insurer willing to cover the costs of that surgery as it was scheduled in August 1988.

11. She later obtained insurance coverage approval for the surgery from a secondary source and rescheduled the procedure for November 1988.

12. Plaintiff informed ASD of the surgery scheduled in November 1988 by a document accurately depicted as Exhibit D.

13. ASD or its attorneys received before April 1989 medical and surgical reports related to plaintiff's surgery and ongoing recovery.

14. In the winter of 1988-1989 and early spring of 1989, plaintiff suffered great pain as a result of her extensive surgery.

15. During this time and even into April 1989, plaintiff was taking medication virtually every few hours of every day for her pain. This medication itself enervated plaintiff.

16. The surgery was performed in Phoenix, Arizona. Following her discharge from the hospital where the surgery was performed she remained in Phoenix, Arizona, until May 21, 1989.

17. ASD knew of her temporary residence in Phoenix from November 1988 to May 21, 1989.

18. While in Phoenix and while recovering, plaintiff was sent a number of missives by ASD. Included among them were:

(a) a memorandum from Tricia Anderson to the plaintiff dated January 25, 1989 – a true and correct copy is attached as Exhibit E. Ms. McGinnis responded to Exhibit E by a letter dated February 10, 1989, and attached hereto as Exhibit F;

(b) a letter dated January 30, 1989, from a Mr. Lindquist to the plaintiff – a true and correct copy of which is attached hereto as Exhibit G. The plaintiff responded to Mr. Lindquist by letter dated February 15, 1989 – a true and correct copy of which is attached hereto as Exhibit H;

(c) a letter dated February 27, 1989, from Tricia Anderson – a true and correct copy of which is attached hereto as Exhibit I;

(d) a letter from Mr. Lindquist to Ms. McGinnis also dated February 27, 1989 – a true and correct copy of which is attached hereto as Exhibit J. Ms. McGinnis responded to this letter by a letter to Mr. Lindquist dated March 14, 1989 – a true and correct copy of which is attached hereto as Exhibit K;

(e) a letter dated March 7, 1989, from Warran Dvorak – a true and correct copy of which is attached hereto as Exhibit L; and

(f) a letter dated March 30, 1989, from Warren Dvorak – a true and correct copy of which is attached hereto as Exhibit M.

19. ASD soon thereafter sent plaintiff a letter dated April 5, 1989 – a true and correct copy of which is attached as Exhibit N.

20. Plaintiff is informed and so alleges that Exhibit N is a document which ASD believes effected a termination of plaintiff's employment as a tenured teacher with ASD.

21. Plaintiff remained in Phoenix until May 21, 1989. She thereupon returned to Anchorage, Alaska, to complete her recovery from her accident and from surgery.

22. At no time prior to the January 30, 1989, letter from Mr. Lindquist (Exhibit G) did ASD ask Ms. McGinnis to request leave formally in writing.

23. It did not require her to do so in January 1988 when she was injured.

24. It did not require her to do so in September 1988 at the beginning of the 1988-1989 school year.

COUNT I (SEEKING DECLARATION THAT THE TERMINATION ATTEMPT OF APRIL 5, 1989, WAS INEFFECTUAL)

1. Exhibit N is not sufficient notice of dismissal or nonretention under Alaska Statutes.

2. Exhibit N effectively denied plaintiff her hearing rights because it contained no indication those rights existed or any description of those rights.

3. Exhibit N is not a typical notice of nonretention or dismissal by ASD.

4. Exhibit N is no notice of nonretention because by its terms it is retroactive, effectively denying plaintiff timely hearing rights.

5. Exhibit N is not sufficient notice of nonretention or dismissal in that it is by its terms retroactive and, therefore, denies plaintiff the opportunity to request a hearing within 15 days of notice of termination.

6. Exhibit N is insufficient notice because it is retroactive and retroactive notice is not contemplated by the statutes.

7. Exhibit N is untimely notice in that: (a) notice of nonretention of tenured teachers is required on or before March 15 of the school year involved, (b) this action by ASD may not properly be considered a dismissal because

ASD was fully aware of all the circumstances which led it to send its Exhibit N prior to March 15, 1989.

8. Dismissal or nonretention such that plaintiff would not be entitled to a job opportunity as a tenured teacher on recovery is not allowed under state law in these circumstances.

COUNT II (EXCUSE OF FAILURE OF CONDITION PRECEDENT TO ENFORCING HEARING RIGHTS)

1. Plaintiff's performance under A.S. 14.20.180 was rendered impossible or impracticable by her medical condition and other circumstances.

2. Failure of the plaintiff to seek a hearing in April 1989 was the fault of ASD.

3. ASD prevented plaintiff's performance of any condition precedent to a full hearing in this case.

COUNT III (BREACH OF EMPLOYMENT CONTRACT BY ASD)

1. There was no substantial noncompliance on the part of the plaintiff.

2. Even if Exhibit N is considered adequate notice of nonretention or dismissal, even if her performance is not rendered impossible or impracticable, and even if ASD did not contribute to her difficulties, her actions on their face do not justify termination.

3. Alternative to the above, the circumstances of plaintiff's situation of April 1989 render her performance or lack of performance justifiable.

4. There was no breach on the part of the plaintiff such as to justify ASD's action in that plaintiff substantially performed according to the directives of ASD.

5. Plaintiff did not fail in a condition to her continuing contract rights because ASD was estopped to claim failure of condition.

6. ASD itself breached an implied obligation of good faith in its dealings with plaintiff respecting conditions of continuing employment.

7. ASD's actions are unconscionable and cannot support an involuntary termination of plaintiff's employment as a certificated employee with ASD.

COUNT IV (TORT CLAIMS)

1. ASD's action is wrongful and violative of public policy in that it was in retaliation for plaintiff's workers' compensation claim and grew to a substantial degree out of a successful grievance that plaintiff instituted against ASD in 1986-1987.

2. ASD's actions constitute wrongful interference with plaintiff's employment contract.

WHEREFORE, plaintiff prays for a judgment:

1. Declaring ASD's notice of termination was ineffectual (Count I).

2. Plaintiff did not impermissibly fail in any condition precedent to her right to a hearing under A.S. 14.20.180 and requiring ASD to provide plaintiff with such a hearing (Count II).

3. Ordering defendant breached its contract with plaintiff and for damages.

4. That the breach of agreement by ASD was wrongful and violative of public policy and/or a wrong interference with plaintiff's employment contract and for damages in excess of $35,000.

DATED at Anchorage, Alaska, this 16th day of October, 1989.

KELLY & PATTERSON
Attorneys for Plaintiff

By: /s/ Paul D. Kelly
John B. Patterson

APPENDIX E

CALIFORNIA WESTERN SCHOOL OF LAW

[Seal]

August 5, 1992

(Received Aug. 10, 1992 – Personnel)

Attention: J. Edward Linquist
Anchorage School District
P.O. Box 196614
Anchorage, AK 99519-6614

Dear Mr. Linquist:

Re: Sherry L. McGinnis

This is to certify that Sherry L. McGinnis is currently enrolled as a full-time student in good standing at California Western School of Law.

She will complete her degree requirements upon pending receipt of summer 1992 semester grades.

Very truly yours,

/s/ Katharine Rosenberry
Katharine Rosenberry
Associate Dean

KR:km

cc: Student File

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

SHERRY L. McGINNIS, Plaintiff, v. ANCHORAGE SCHOOL DISTRICT, ANCHORAGE EDUCATION ASSOCIATION, and CHANCY CROFT and JOHN PATTERSON as individuals, Defendants.	)	No. A94-385 Civ. (JWS)

DEPOSITION OF SHERRY L. McGINNIS
VOLUME I
JUNE 22, 1995

APPEARANCES:

For Plaintiff in Propia Persona:
SHERRY L. McGINNIS, ESQ.
405 West Washington Street, Suite 24
San Diego, CA 92103
(619) 497-0862

For Defendant in Propia Persona:
CHANCY CROFT, ESQ.
LAW OFFICES OF CHANCY CROFT
738 H Street
Anchorage, AK 99501
(907) 272-3508

For Defendant
John B. Patterson: MARCUS R. CLAPP, ESQ.
CRAIG F. STOWERS, ESQ.
CLAPP, PETERSON & STOWERS
1972 Swallow Drive
P. O. Box 80965
Fairbanks, AK 99708-0965
(907) 479-7727

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

SHERRY L. McGINNIS, Plaintiff, v. ANCHORAGE SCHOOL DISTRICT, ANCHORAGE EDUCATION ASSOCIATION, and CHANCY CROFT and JOHN PATTERSON as individuals, Defendants.	)	No. A94-385 Civ. (JWS)

DEPOSITION OF SHERRY L. McGINNIS
VOLUME II
JUNE 22, 1995

APPEARANCES:

For Plaintiff
in Propia Persona: SHERRY L. McGINNIS, ESQ.
405 West Washington Street,
Suite 24
San Diego, CA 92103
(619) 497-0862

For Defendant in
Propia Persona: CHANCY CROFT, ESQ.
LAW OFFICES OF
CHANCY CROFT
738 H Street
Anchorage, AK 99501
(907) 272-3508

For Defendant
John B. Patterson: MARCUS R. CLAPP, ESQ.
CLAPP, PETERSON & STOWERS
1972 Swallow Drive
P. O. Box 80965
Fairbanks, AK 99708-0965
(907) 479-7727

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

SHERRY L. McGINNIS, Plaintiff, v. ANCHORAGE SCHOOL DISTRICT, ANCHORAGE EDUCATION ASSOCIATION, and CHANCY CROFT and JOHN PATTERSON as individuals, Defendants.	)	No. A94-385 Civ. (JWS)

DEPOSITION OF SHERRY L. McGINNIS
VOLUME III
JUNE 24, 1995

APPEARANCES:

For Plaintiff
in Propia Persona: SHERRY L. McGINNIS, ESQ.
405 West Washington Street,
Suite 24
San Diego, CA 92103
(619) 497-0862

For Defendant in
Propia Persona: CHANCY CROFT, ESQ.
LAW OFFICES OF
CHANCY CROFT
738 H Street
Anchorage, AK 99501
(907) 272-3508

* * *

[p. 10] THE WITNESS: My name is Sherry L. McGinnis. The last name is spelled M-C, capital G-I-N-N-I-S.

THE REPORTER: And your present mailing address?

THE WITNESS: 405 West Washington Street, Suite 24, San Diego, California, 92103.

THE REPORTER: And your phone number?

THE WITNESS: 619/497-0862.

THE REPORTER: Thank you. You may proceed.

DIRECT EXAMINATION

BY MR. JOSEPHSON:

Q Miss McGinnis, since you are a . . .

A It is Ms. McGinnis.

Q Ms. McGinnis? Since you are a – an attorney licensed in California and have probably attended many depositions, I think you're familiar with the procedure. Is that right?

A That is correct.

Q And if – but of course, if you hear me ask any question that you want me to repeat, you'll ask me to repeat, won't you?

A Yes, I will.

Q And if – if I confuse you in any way, please interrupt me so I can restate my question.

A I'll do that.

Q All right. Now, the first thing I'd like to do as

* * *

[p. 13] A One time.

Q And did you take any preparatory course in anticipation of the LSAT?

A I would object to that question on the basis of my constitutional rights to privacy. However, nonetheless, I will answer that question. I did not – I don't believe I took a preparatory class that I recall.

Q Are there any notes or records you might have that would indicate whether or not you actually took a preparatory course or prep – prep program for the LSAT?

A I don't believe so.

Q And you were admitted to the Bar in 1993, correct?

A Yes, that is correct.

Q And you are self-employed as an attorney in California?

A Yes, I am.

Q Could you tell us in general terms what your practice consists of?

A I would object to that question on the grounds of my constitutional rights to privacy; however, notwithstanding that objection, my general area of practice is in the area of business law including business litigation.

Q Of course, the question of how you practice and what

* * *

[p. 19] you the letter again.

A No, the only reason I'm hesitating is I believe initially, she was planning to mail it to me but because of the short time, then that was, yes, the final arrangement that was made.

Q No, the morning of August 25th is the morning you reported for work in the fall of '92?

A I believe it was.

Q Okay, what happened on that day?

A I would object to that question in – in that it requires me to give a narrative but could you be more specific as to what you want.

Q Well, I was asking you to state in your own words what – what happened. I'll rephrase the question if it helps. Why – did you remain at school the whole day, August 25th?

A No, I did not.

Q And – and for – for what reason did you not remain at school the whole day?

A I did not remain at school because upon my arrival, there was no contract for teaching.

Q Did you discuss that matter with anyone in the hierarchy of the School District or at the school?

A I discussed it with the principal.

Q And what was his name?

* * *

[p. 119] A Meaning that I wanted to get the contract taken care of first, yes.

Q He told you that he had called the District office about your concern about the contract, right?

A Yes, I believe so.

Q And your note says Bowie knew nothing about my contract, said ASD office open to 8:00 a.m.; would have to check with them, right?

A That's right.

Q Did you check with them on August 25th about your contract?

A I don't believe I did.

Q Okay. Exhibit 48 which I'll hand you purports to be another letter from Mr. Patterson to you, Mrs. – Ms. McGinnis. Did you receive that letter?

A (Pause). I believe I remember receiving that correspondence from Mr. Patterson.

Q First of all, in the August 28th letter, Mr. Patterson began by saying a few days (indiscernible), again, ago, when we visited at my office, I was saddened to see how poorly we communicate. So the August 28 letter indicates that there was a visit at his office a few days before which would be on or about the 25th. Do you take exception to that or is that probably correct?

A That's probably correct.

* * *

[p. 620] A I don't recall.

Q You don't have any recollection of talking with him about what he was going to do while you were in the in-service or what kinds of things he'd be able to do while you were getting ready for school?

A Not in particular, no.

Q You don't recall any plans that you guys had or talked about that he would be able to engage in while you were – in – taking the in-service?

A I don't recall those conversations, no.

Q When you talked to Mr. Bowie, you learned that there wasn't a contract waiting for you at West High School, correct?

A I was informed of that, yes.

Q And you were advised by Mr. Bowie that you could contact the personnel department of the Anchorage School District to get your contract or determine where your contract was?

A I believe that – that is what he – he said.

Q And did he tell you you should talk to Karen or Ed Lindquist or any particular person about where your contract might be?

A Not that I recall.

Q Did you in fact call Karen or Ed Lindquist or anyone at the Anchorage Administration Building in the

personnel [p. 621] department about where your contract was?

A I don't believe I did.

Q Why not? Mr. Bowie suggested that you do so; you had corresponded with Karen, talked to her and yet you didn't call anyone else when your contract wasn't there. Why not?

A I was represented by counsel.

Q And that was whom?

A Mr. Patterson.

Q Okay. As of that morning, August 25th, when you told Mr. Bowie or Mr. Bowie told you that the contract wasn't there, had you up to that point in time relied on the advice given to you by counsel?

A As far as I can remember, yes.

Q Which counsel were you relying on? Mr. Patterson or Mr. Hemenway? You actually had two counsel during that period in 1992, did you not?

A I don't recall how many counsel I had during that period.

Q You at least had Mr. Patterson and Mr. Hemenway, did you not?

A I don't know if that was in 1992 or not.

Q Okay. Did you call Mr. Hemenway after Mr. Bowie told you the contract isn't here, call somebody in personnel to find out?

* * *

[p. 624] Q Okay. You refused both times. Do you recall asking Mr. Patterson to put his advice to you in writing?

A No, I don't.

Q Do you recall Mr. Patterson putting his advice to you in writing on the morning of August 25th?

A I recall him putting something in writing that day, yes.

Q Take a look at Exhibit No. 47. Is that the something that he put in writing?

A Yes, as I recall, it is.

Q And why did he do that? Do you have any idea?

A I couldn't tell you why Mr. Patterson would or would not do something.

Q He just wrote this down and handed it to you and said here, Sherry, take this?

A I don't know what you mean by he just. Could you explain the question, please?

Q No, actually, let me ask you to explain how did you come into possession of the document that we have here as a copy of Exhibit 47?

A Mr. Patterson gave it to me.

Q And describe the circumstances under which he gave it to you.

A We were in the conference room of the building where he has his office.

* * *

[p. 631] intended for harassment or to annoy me by repeating questions that you have already asked and I've already answered and I would re – ask that you would refrain from doing so.

Q I apologize to you. I didn't intend to harass you or be argumentative with you. Did – did Mr. Patterson tell you that you should return to West High School?

A I believe he may have, yes.

Q Did you do that?

A No.

Q Did Mr. Patterson tell you you should contact the personnel department?

A It seems to me in reviewing the documents and things we've talked about here, I believe he may have said that, yes.

Q You didn't return to West High School?

A Asked and answered. No.

Q Why didn't you return to West High School?

A I had no contract.

Q Even though Mr. Patterson who was your legal representative to whom you'd gone for advice, legal advice, told you you did have a contract, you need to go back to West High School, you – you ignored that advice?

A Yes.

[p. 632] Q You didn't contact anybody with the Anchorage School District after you spoke with Mr. Bowie, did you?

A That has been asked and has been answered.

Q Okay. I'm going to assume the answer is no. If you refuse to answer it. If – if my . . .

A I'm refusing to answer it the second time.

Q If my assumption is incorrect, I'd like you to correct me right now. Otherwise, I will assume that the answer is no. Can you – can you read this statement that was provided to you by Mr. Patterson?

A Do – would you mind if he reads a – it's very difficult to read.

Q I'd actually like you to have a try first.

A I can – I can certainly try. The handwriting is – is pretty bad.

Q And I – I would stipulate to that.

MR. PATTERSON: So I wouldn't stipulate.

(Laughter).

THE WITNESS: Sometimes if you turn handwriting to the side, you can make it out better.

MR. OWENS RESUMES:

Q You can look at this way, this way, however you . . .

A It's [sic] says I believe – no good. We can have help then. Sherry, your – you – it may just be you. You

have a contract to – it really looks like it says trash but [p. 633] I'm sure it doesn't say the trash. It must say to teach. To teach with ASD. Your – and Mr. Patterson, I need to point out in good humor here that you left the apostrophe out for you are – your . . .

Q Just read from where he left the "e" off the end.

A Oh, I'm sorry. I apologize. I apologize. I take back that joke because it shouldn't have been in there at all and I slap my hand. I should know better. Your written contract may not have been tendered. Tendered. But do not fail? Do not fail to perform your duties on that account. If they refuse you access to your class or . . .

Q Finally?

A finally. [sic] Finally, expressly refuse to provide the written contract. I likely would tell you you are excused from – is that tendering?

Q I believe it is.

A Ten – tendering your service any further.

Q But . . .

A But do not fail to tender those services until I tell you it is clear HS – ASD will not allow you to work. J. B. Patterson.

Q Was that – is this a fair summary of the advice that Mr. Patterson gave to you when you went to his office on August 25th, 1992?

[p. 634] A I believe so.

Q All right. Did he tell you this verbally as well as writing it down for you?

A I believe he did.

Q And your recollection is that he did this – he wrote this down not at your request but for some purpose of his own?

A Yes.

Q All right. After you received . . .

A As I recall at least.

Q Was there any other advice that you can recall him giving you other than what's contained in this document?

A On this particular day you mean?

Q That's correct.

A Not that I recall.

Q What did you do after receiving this information and meeting with Mr. Patterson?

A I don't remember.

Q You didn't go back to West High School?

A No, I didn't.

Q And you didn't contact the Anchorage School District personnel department or anyone else?

A No, not that I – not that I remember. I may hesitate because I – I – there – we had discussed the other

* * *

APPENDIX G

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

SHERRY L. MCGINNIS,
Plaintiff,
vs.
ANCHORAGE SCHOOL DISTRICT,
Defendant.

Case No. 3AN-89-8657 CI

ORDER GRANTING SUMMARY JUDGMENT

The court has reviewed the parties' cross-motions for summary judgment and accompanying memoranda. The court finds there are no genuine issues of material fact and that judgment should be entered as a matter of law.

The undisputed facts are that plaintiff, while employed by defendant at Dimond High School, suffered a work-related injury on or about January 7, 1988. Plaintiff was unable to return to work until her treating physican [sic] gave her a full release to return effective May 8, 1990. During such time defendant attempted to require her to elect to either return to work, go on leave without pay, or terminate her employment. Plaintiff refused to make an election. Thereafter, defendant on April 5, 1989 terminated plaintiff.

On October 19, 1989, plaintiff filed the instant action. Defendant answered the complaint on November 8, 1989. In September, 1990 it became apparent that settlement could not be reached.

Defendant has contended, until its opposition and cross-motion for summary judgment in 1992, that plaintiff had been terminated for failure to make an election either requesting leave without pay, returning to work, or terminating. In the alternative, defendant contended in its opposition and cross-motion that by failing to request leave without pay status, returning to work, or terminating, after May 8, 1990 she was terminated because of unauthorized and unapproved absence. This contention is without merit. The court concludes that defendant had improperly terminated plaintiff prior to May 8, 1990 and that plaintiff was not legally required to offer herself for work or leave without pay status. The questions had been joined as a result of her lawsuit which was answered by the District. Neither filing the answer, nor actions taken by the District thereafter, can constitute notice of termination or an unconditional offer of reinstatement of the plaintiff who had been previously terminated improperly.

IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is hereby GRANTED and plaintiff shall be immediately offered reinstatement with no break in service.

Defendant's cross-motion for summary judgment is DENIED.

DATED at Anchorage, Alaska this 16 day of June, 1992.

/s/ Karl S. Johnstone
KARL S. JOHNSTONE
Superior Court Judge

APPENDIX H

Sherry L. McGinnis
2225 Linwood Street
Apartment B-10
San Diego, CA 92110

John Patterson
2263 Spenard Road
Anchorage, AK 99503

July 8, 1992

Dear John,

I have been waiting for your response to my June 16, 1992, letter requesting clarification of your May 19, 1992, letter and for copies of the exhibits which were attached to the documents enclosed with your letter. What is a rule 54b motion which you suspect would not be successful?

I am in the process of retaining counsel to pursue a tort action against the Anchorage School District. Because Mr. Hemenway is no longer my attorney, I revoke the January 7, 1992, waiver of attorney-client privilege with respect to him. Until further notice all correspondence is to be directed to me at my California address.

I am making arrangements to return to Alaska in August to resume my teaching position. I will notify you of my Alaska address as soon as possible.

1. What do I need to do to reinstate my teaching position for the 1992-1993 school year?

2. How can I obtain details of my teaching assignment? e.g. where I will be assigned, what courses I will teach, what the school calendar is.

3. What steps do I need to take to reinstate my insurance with the Anchorage School District?

4. What is the status of my sick leave and personal leave? As you will remember ASO wrote a check to me in 1989 which they later refused to honor as payment for accumulated sick leave and personal leave. What do I need to do to receive credit for the days which I accumulated, but which I did not use prior to the accident?

Along with your response to these questions, please send a complete copy of my case file. Thank you.

Sincerely,

Sherry L. McGinnis

APPENDIX I

LAW OFFICES

KELLY & PATTERSON

(names and addresses omitted in printing)

July 21, 1992

Sherry McGinnis
2225 Linwood Street
Apartment B-10
San Diego, Calif. 92110

Dear Sherry:

Responding to your letter of July 17, 1992.

You do not need further information to respond to the District's offer to employ you in 1992-1993 in conformance with the trial court's order. There is little about the reinstatement order which will affect rights you have to proceed under other allegations of your complaint.

When I mentioned a Rule 54 b motion I had it in mind that the District might not be willing to reinstate you until the case in its entirety is disposed of. Rule 54b allows a litigant who is successful as to part of his case or as to less than all his adversaries to separate that part of his case from the rest so as to get a final judgment on the part on which he has been successful from what has not been tried. I now realize the District knows that ultimately you will succeed on the reinstatement part of the case and that refusing to reinstate as soon as possible will only result in its having to pay your wages during a time when the rest of the case or an appeal progresses. Please do not think you can put the district in a position of having to pay you for any part of 1992-1993 while you do

not work. The District has now avoided that possibility by offering to put you to work. You now have the problem because you have not responded to a reasonable effort by the District to make contact with you and to normalize its relations with its employee. Let me be perfectly clear here: if you do not now treat the District as any other employee would treat it you will lose this opportunity to go to work as a teacher for the District. That means you directly must contact the personnel office and make arrangements for working. Again, there should be nothing about this case from your point of view which would deter you from making this beginning. In other words, at least in terms of priorities, you need no further information "concerning (your) wrongful termination by the Anchorage School District" before proceeding to make normal arrangements with the District preparatory to assuming a teaching position this coming year. I have already told Brad Owens not to close his file. (See enclosure) If you have some doubts about possibly waiving your right to proceed by establishing normal relations with the District, I suggest you simply and courteously remind the Personnel Office that the final judgment has not been entered and that you are waiving nothing by beginning work. You might also say your contact is understood to be without prejudice to any rights or claims under the lawsuit.

I was told by Mr. Hemenway that you would be representing yourself. Perhaps he assumed that. But beyond that I have made it perfectly clear that I will not represent you beyond the point of achieving your reinstatement. And that has been accomplished. Whether you are actually reinstated is entirely in your hands now. And I

implore you not to miss this opportunity achieved at substantial effort. I also believe AEA has accomplished its mission; so the matter of proceeding with this case is left to you. I believe I explained I would not think there to be even a question about ending the case right now but for the approach of the District in its final briefing. I do not believe I would advise you to pursue it, even if I had the ability to advise you with effect, but I cannot even clearly assess what my advice is because of the difficulty I have in communicating with you and working with you. At a minimum the case needs a fresh perspective, and in all likelihood what remains needs to be dismissed and put forever behind you.

As far as I can see the District is doing what the Court ordered as regards reinstatement. You should not read anything into the Order requiring the District to reinstate you regards following any particular procedure. The Order, I believe, means the District will treat you as any other employee, and if the District makes contact with its employees before putting them to work it is entitled to have contact with you before putting you to work. As I read the Order you, as regards reinstatement, are no longer a litigant or a special case., You are an ordinary certificated employee. YOU MUST CONTACT THE PERSONNEL DEPARTMENT.

If the Lindquist letter was mailed too late for you to respond its demand for response within a timeline will not be given effect. But there is no reason why the 15 days should not run from the time you actually received the notice. You can not treat a demand for a timely response as if the District has no right to reasonable response, whatsoever.

Your file weighs at least 10 pounds. There is little in the file which you do not already have. I do not have the staff or the time to copy that file. You may copy anything in the file when you arrive in town, or if you have someone in town who can come over to make the copies please let me know. Also you will receive the file when I am removed from the case – if you want to proceed forther [sic] with it. Again, there is nothing in the file which is significant you do not already have. In fact, you provided me with most of the material I have there. And there is nothing in the file which should bear on whether you contact the District, immediately. The District has put the burden entirely on you concerning whether you will be employed by it.

You also asked questions concerning insurance and sick leave. I cannot answer those questions. They do not relate directly to the job I was commissioned to do. and I suspect they can be answered through direct contact with the District's personnel office. If they are not satisfactorily answered, the matter might be something AEA can solve.

Sincerely,

KELLY & PATTERSON

/s/ John B. Patterson
John B. Patterson

APPENDIX J

Sherry L. McGinnis
2225 Linwood Street
Apartment B-10
San Diego, CA 92110

Anchorage School District
P.O. Box 196614
Anchorage, AK 99519-6614

Illegible 619-497-Illegible

July 27, 1992

(Received July 31, 1992)

Attn: J. Edward Linquist,
Executive Director of Personnel

Dear Mr. Linquist,

John Patterson informed me by letter dated July 21, 1992, that I should contact you directly to complete the arrangements for my reinstatement as a teacher.

I am most anxious to cooperate with you in resuming teaching responsibilities within ASO. Right now I'm working through an agent at Century 21 in Anchorage to purchase a townhouse, but in the meanwhile please direct your correspondence to the address listed on this letter. It may be necessary for me to take an apartment until I can close on a townhouse, but I'll let you know as soon as possible what address I will have in Anchorage.

Do you know if there still exists in Seattle a car dealer who gives discounts on new cars to teachers? I want to purchase a new four-wheel vehicle and it use to be less expensive to purchase in Seattle and have it shipped to Alaska.

Please send my contract and details of my teaching position so that I can prepare lesson plans for the opening of school. What subjects will I be teaching? When do I need to report? Please send a copy of the 1992-1993 school calendar. Do I need to fill out new insurance forms? Will my unused personal and sick leave days be automatically reinstated or do I need to fill out paperwork to complete the process? You will remember that initially you issued checks as payment for these days, but the checks were never cashed, and you decided not to reissue them.

I would appreciate copies of the texts which I will be using so that I can begin work on my lesson plans. I will be happy to pay the cost of postage.

Also, please send the name and address of the principal at Diamond High School; I would like to correspond with him/her to introduce myself and to let him/her know when I will arrive in Anchorage.

Thank you.

Sincerely,

/s/ Sherry L. McGinnis
Sherry L. McGinnis

APPENDIX K

Sherry L. McGinnis
2225 Linwood Street
Apartment B-10
San Diego, CA 92110

Anchorage School District
P.O. Box 196614
Anchorage, AK 99519-6614

August 7, 1992

Attn: J. Edward Linquist,
Executive Director of Personnel

Dear Mr. Linquist,

Earlier today I received a telephone call from Lance Bowie, principal of West High School, confirming my 1992-1993 teaching contract with the Anchorage School District. Lance made the following representations:

1. I have been assigned to West High School for the 1992-1993 school year.

2. I will teach English 10-1, Individualized Writing and Intermediate Composition.

Lance and I discussed the format for meeting classes in two-hour blocks, the 7:00 a.m. to 2:30 p.m. school day, the four-day inservice for teachers beginning August 25th, and that students begin classes on August 31st. Lance said he would mail a copy of the latter he has prepared for teachers concerning the details of school opening. Additionally, he will mail a copy of course descriptions and text books so that I can prepare lesson plans.

I informed Lance that I am working with a realtor concerning the purchase of a townhouse. Based upon Lance's representations, I will proceed to finalize relocation and travel plans.

I'm pleased with the position and particularly the assignment to West High School since it has a very good reputation. Thank you for your prompt reply to my letter of July 27, 1992.

Sincerely,

/s/ Sherry L. McGinnis
Sherry L. McGinnis

APPENDIX L

Sherry L. McGinnis
2225 Linwood Street
Apartment B-10
San Diego, CA 92110

Anchorage School District
P.O. Box 196614
Anchorage, AK 99519-6614

VIA FACSIMILE AND MAIL

Attn: J. Edward Linquist,
Executive Director of Personnel

August 20, 1992

Dear Mr. Linquist,

Earlier today I received a telephone call from Karen who identified herself as an employee in the Personnel Department of the Anchorage School District. Karen stated she had a prepared teaching contract ready for my signature and wanted to know if she should mail it to me along with insurance benefit information. Given the fact that her telephone call was made only five days prior to the teachers' reporting date for the beginning of school, Karen agreed it would be logistically impossible for a mailing from Alaska to reach me in California prior to my departure for Alaska. Therefore, Karen assured me that both my contract and my benefits package would be available at West High School upon my arrival Tuesday morning, August 25, 1992, when I report for teaching.

Also discussed was the required upward adjustment to my salary step placement since I have completed all requirements for a Juris Doctor degree. Karen indicated

that after adjustment my salary for the 1992-1993 school year is in the range of forty-eight thousand and eight hundred dollars ($48,800.00). Karen said she would call me back today if any further information is required from California Western School of Law, in addition to the documentation previously sent by the law school to ASD, to complete the paperwork.

Finally, when Karen asked whether I wanted payment of my 1992-1993 teaching contract in ten or twelve payments, I responded that I desired ten salary payments.

Sincerely,

/s/ Sherry L. McGinnis
Sherry L. McGinnis

APPENDIX M

[Handwritten Note Originally]

Sherry, you have a contract to teach with A.S.D. – your written contract may not have been tendered, but do not fail to perform your duties on that account.

If they refuse you access to your class or finally expressly refuse to provide the written contract, I likely would tell you you are excused from tendering your services any further. But do not fail to tender those services until I tell you it is clear A.S.D. will not allow you to work.

/s/ J.B. Patterson

APPENDIX N

Anchorage Education Association (Logo)

1411 West 33rd Avenue * Anchorage, Alaska 99503 *
(907)274-0536

To: Sherry McGinnis
P.O. Box 320
200 W. 34 Ave
Anchorage, AK 99503

From: Mark L. Jones
UniServ Representative
NEA-AK, AEA

Re: Return to Work, Issues of back pay

Date: August 31, 1992

As per our phone conversation of August 27, 1992 the Anchorage School District has requested a meeting with you and your Association representative prior to your return to work. The meeting was intended to deal with your actions on Tuesday, August 25, 1992. On August 25, 1992 you discovered that a written contract was not waiting for you at your assigned work site, West High School. Your response was to leave West High School. You notified Attorney John Patterson of your actions in this matter late in the afternoon of August 26, 1992. At that time you were notified by Mr. Patterson and by myself, via John Patterson, that your absence from your assigned duty station was an inappropriate response to the district's failure to supply you with a written contract. At that time both Mr. Patterson and I advised you that you should return to your duty station as soon as possible. As

of Thursday afternoon, August 27, 1992, you had not returned to work.

In the interim I had made contact with the Executive Director of Personnel for ASD, Ed Lindquist in order to obtain the written contract which you had requested. At that time I was advised by Dr. Lindquist that your exchange with your unit administrator and your unexcused absence from your duty station necessitated a conference between you and the ASD administration prior to your return to work. When I shared the ASD request with you, your response was something to the effect that we need to talk about that at a later date. As of this afternoon I have not heard from you regarding the requested meeting with Dr. Ed Lindquist. I fear that your failure to respond to the District's request for a meeting and your continued unexcused absence from your assigned duty station could result in further disciplinary action. In order to avoid further conflicts with the district I would advise you to respond to the district's request for a meeting and then return to work.

In response to your request that ASD made you financially whole for the lost work time and for the $2760.21 for unused personal leave and contract balance I have spoken with Dr. Lindquist on two occasions and have written the attached letter. Should you have any questions or concerns regarding the attached letter please contact me at the NEA-AK office, 274-0536.

It would be very helpful if you would provide the Association and the District with a current phone number in order to facilitate timely communication. The inability of either the District or the Association to communicate with

you makes it very difficult to address your remaining issues. Furthermore, your failure to notify the District of your whereabouts and/or intentions regarding your continued employment with ASD may force the District to take further action(s) against you. Please contact this office in order that we might assist your return to work.

APPENDIX O

LAW OFFICES
KELLY & PATTERSON

PAUL D. KELLY
JOHN B. PATTERSON

2263 SPENARD ROAD
ANCHORAGE ALASKA 99603
(907) 258-6777
FAX (907) 279-9216

August 28, 1992

Sherry McGinnis
C/O Brock Shamberg
P.O. Box 110295
Anchorage, Alaska 99511-0295

Dear Sherry:

A few days age [sic] when we visited at my office I was saddened to see how poorly we communicate and how suspicious you are of my advice to you. I understand you now have the written contract from ASD and have been invited to sign it and return it. Mark tells me, however, that you have not returned the contract and have not been in the classroom. You can see your concern that you did not have a "contract" with the district was misplaced; although, I believe that concern can at least appear to have been justified. However, if you value income from employment this year I think you can see you should now report to work. I only tell you this because I believe that your suspicions of the District have perhaps caused you to lose perspective. I do not believe that your beginning work now will materially affect your ability to enforce any other contract rights which are yet unsatisfied. At least, I believe the risk there is much less that the risk you take of losing even the job by not returning to work when work is offered.

Frankly, I think there is little left of a reasonable attorney-client relationship between the two of us. If you agree we should execute a stipulation to substitute counsel. I have alerted AEA to this possibility and have asked AEA to be prepared to supply other approved counsel to complete this case. Most notably what needs to be considered is the question of contract damages. When you went off to law school I told you you were jeopardizing those damages – that your time in law school would likely be considered like leave without pay. But I have never had the opportunity to discuss the circumstances of your schooling. If you would like we might do that.

You know I did not even know where you were, except generally, for about two years. I would appreciate being provided with a local address and telephone number. This is the second time I have had to address you through another attorney. And please, in the future, if you want my assistance with the contract damages, and if we can get along even that long, let us be able to communicate orally. I have never been asked to write advice as I was the other day. I know you understood perfectly what I was saying. I understand you were upset, but that sort of thing makes no sense.

Sincerely,

KELLY & PATTERSON

/s/ John B. Patterson
John B. Patterson

APPENDIX P

ANCHORAGE SCHOOL DISTRICT
CERTIFICATED EMPLOYEE'S CONTRACT

SOCIAL SECURITY NUMBER 445-44-4576

LAST NAME MCGINNIS

FIRST NAME SHERRY

MIDDLE INITIAL L.

REPORTING DATE August 25, 1992

OCCUPATION CODE ZSQ200

LOCATION CODE 850

It is agreed between the Anchorage School District, hereinafter referred to as the District, and the undersigned employee, hereinafter referred to as the Teacher, as follows:

CONTRACT PROVISIONS

SCHOOL YEAR 1992/93

DISTRICT STEP BOOOB

ANNUAL SALARY $37,330.00

MONTHLY SALARY $3,733.00

PER DIEM. $198.56

#OF MO. PAYMENTS 10

TIME RATIO	DATE 1ST PAYMENT DUE
1.000	September 30, 1992

LENGTH OF SERVICE IN SCHOOL DAYS
INCLUDING LEGAL HOLIDAYS
188

THIS CONTRACT MUST BE SIGNED AND
RETURNED TO THE
DISTRICT WITHIN 30 DAYS FROM
August 24, 1992

1. The Teacher will perform the duties of Teacher as prescribed by the District during the period, and at the rate of pay, set forth above, such pay not to exceed the pay rate for the Teacher's assigned position, with his/her experience and education, as set forth on the pertinent District salary schedule.

2. All benefits under this contract accrue from reporting date except life insurance and medical insurance which are effective on the first day of the month following the actual reporting date.

By signing this contract, the Teacher subscribes to the oath of allegiance as prescribed by AS 39.05.130 or, if the Teacher is not a United States citizen, the following: "I do solemnly swear (or affirm) that I do not advocate the overthrow of the constitutional form of government of the United States or Alaska and I will faithfully discharge my duties as Teacher to the best of my ability."

4. The Teacher shall abide by the code of ethics and the professional teaching standards adopted by the Professional Teaching Practices Commission.

5. The Teacher authorizes deductions for Teacher's Retirement System if eligible or FICA (Social Security) if applicable.

6. The teacher will file with the District a current medical certificate on or before the reporting date.

7. The Teacher shall have an appropriate Alaska Teaching Certificate by the reporting date. This contract may be terminated without penalty to the District if the teacher fails to obtain a valid certificate in accordance with 4 AAC 12.

8. Duties, position, reporting date, and/or location assigned the Teacher pursuant to this contract may be changed by the District as the needs of the District require.

9. This contract may be terminated by mutual consent of both parties upon 3 days written notice by either party and the written consent of the other party. This contract creates no obligation on the District to offer continuing employment to employees except as provided by statute.

10. This contract may be terminated without liability to the District if it becomes necessary to eliminate the position because of a decreased enrollment if at least 30 days written notice is given; in addition, in hardship cases, the District may, in its discretion, afford such compensation as it considers necessary, but not more than payment for 20 days of service at the regular contract per diem rate.

11. This contract may be terminated without liability to the District if the Teacher fails to discharge the duties imposed, either through incapacity/or disability, or for caus [sic], as defined in AS 14.20.170; and the District shall comply with AS 14.20.180. The violation or breach by the Teacher of any term, condition or requirement of

this contract shall be grounds for the District's recommending revocation of his/her certificate by the Commissioner of Education and for termination without liability to the District.

12. This contract is not binding on either the Teacher or the District until it has been approved by the School Board of the District.

13. The sections of the Alaska Statutes mentioned in this contract, as such statutes may be amended from time to time hereafter, are made a part of the contract by reference as though set forth in full herein.

14. The term Teacher is as defined in AS 14.20.215.

15. If there is a conflict in interpretation of the written provisions of this contract and the collective bargaining agreement, the term contained in the collective bargaining agreement shall supersede and prevail over the conflicting term contained in this contract.

I hereby accept this contract and the conditions contained therein:
EMPLOYEE
DATE

This contract is hereby approved and accepted on behalf of the District:
BOARD PRESIDENT
/s/ Illegible

BOARD CLERK
/s/ Illegible

APPENDIX Q

[LOGO]

ANCHORAGE
SCHOOL DISTRICT

4600 DeBarr Avenue
P.O. Box 196614
Anchorage, Alaska 99519-6614
AREA CODE [907] 333-9561

August 31, 1992

[Names Omitted In Printing]

CERTIFIED MAIL

Sherry McGinnis
Suite 320
200 West 34th Avenue
Anchorage, Alaska 99503

Dear Ms. McGinnis:

This letter is to inform you that your employment with the Anchorage School District has been terminated for unauthorized absences.

It was reported that you arrived at your assignment at West High School on Tuesday morning, August 25, told the principal you would not work without a signed contract, and you were directed to go to the Personnel Department to take care of the matter.

You have neither come to the Personnel Department nor returned to your assigned location at West High School. Further, you have not contacted any District official during that period of time. Efforts to contact you have been futile since you have provided no phone number at which

you can be reached. Your conduct in this matter has been clearly unprofessional.

You have now been absent from work for five days without authorization; consequently, in accordance with Alaska Statutes Sec. 14.20.170a.(3) and School Board Policy 537.61, you have been terminated. A copy of these provisions is attached.

You may request a hearing before the School Board concerning your termination, if within 15 days after receipt of this notification, you submit a written request for the hearing according to the procedure which is explained in the attachment to this letter.

Sincerely,

/s/ J. Edward Lindquist
J. Edward Lindquist
Executive Director, Personnel

cc Mark Jones, Anchorage Education Association
John Patterson, Attorney, Anchorage Education Association
Brad Owens, Attorney, Anchorage School District
John Alexander, Director, Contract Administration
Lance Bowie, Principal, West High School
Bill Mell, Executive Director, Secondary Education

Attachments: School Board Policy 537.61 and
AS 14.20.170 and 14.20.180

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§ 14.20.160 COMPILED SCHOOL LAWS OF ALASKA
§ 14.20.170

AS 14.20.145 is expressly made subject to this section Redman v. Department of Educ. Sup. Ct. Op. No. 1009 (File Nos. 1802, 1822), 619 P.2d 760 (1974).

Sec. 14.20.160. Loss of tenure rights. Tenure rights are lost when the teacher's employment in the district is interrupted or terminated (§ 1 ch 92 SLA 1960; am § 1 ch 104 SLA 1966: am § 20 ch 98 SLA 1966; am § 22 ch 37 SLA 1986)

Effect of Amendments – The 1986 amendment deleted "or when the teacher reaches the age of 65" at the end of the section.

Sec. 14.20.165. Restoration of tenure rights. A teacher who held tenure rights and who was retired due to disability under AS 14.25.130, but whose disability (1) has been removed and the removal of that disability is certified by a competent physician following a physical or mental examination, or (2) has been compensated for by rehabilitation or other appropriate restorative education or training, and that rehabilitation or restoration to health has been certified by the division of vocational rehabilitation of the department, shall be restored to full tenure rights in the district from which the teacher was retired at such time as an opening for which the teacher is qualified becomes available. (§ 1 ch 71 SLA 1975)

Sec. 14.20.170. Dismissal. (a) A teacher, including a teacher who has acquired tenure rights, may be dismissed at any time only for the following causes:

(1) incompetency, which is defined as the inability or the unintentional or intentional failure to perform the teacher's customary teaching duties in a satisfactory manner,

(2) immorality, which is defined as the commission of an act which, under the laws of the state, constitutes a crime involving moral turpitude; or

(3) substantial noncompliance with the school laws of the state, the regulations or bylaws of the department, the bylaws of the district, or the written rules of the superintendent.

(b) A teacher may be suspended temporarily with regular compensation during a period of investigation to determine whether or not cause exists (or the issuance of a notification of dismissal according to AS 14.20.180, § 2 ch 92 SLA 1960; am § 21 ch 98 SLA 1966; am §§ 1, 2 ch 104 SLA 1966)

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* * *

jurisdiction, either as a witness or juror, shall receive regular salary for such period of absence less any amounts received for such service. The payroll adjustment will be made at the first payroll period following such service.

537.5 Reporting Procedures

Any employee who must be absent from duty shall notify his/her immediate supervisor of the intended absence in advance if possible, giving reasons for such absence. Failure to give proper

notification may result in less of pay regardless of sick leave or other coverage. In the event that provisions are stipulated for reporting absence to a central answering service, a secondary notification of the immediate supervisor will be required.

537.6 General Matters

537.61 Unapproved Absences

Unapproved absences will not be tolerated and will be considered sufficient cause for discharge. Employees shall not be entitled to any leave benefits while they are engaged in a strike, work stoppage or other interruption of work. District approval of any absences during a strike will be granted only if the employee submits written documentation acceptable to the Administration within one working day after the employee returns to work.

537.62 Loss of Pay

Absence or suspension from duty of any employee shall result in loss of pay for the period of the absence, except as otherwise provided.

537.63 Employment of Substitutes

Teachers may not directly employ substitute teachers, nor in any instance may teachers pay their substitutes directly. Procedures for notification of absence or intended absence and for utilization of the substitute service shall be implemented by the personnel office.

Q6

537.64 Absence From Buildings or Meetings

a. Buildings

Employees shall not be absent from their

* * *

APPENDIX R

Sherry L. McGinnis
3802 Rosecrans Street
Suite 131
San Diego, CA 92110

Plaintiff in propia persona

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE THIRD JUDICIAL DISTRICT OF ALASKA

SHERRY L. McGINNIS Plaintiff, vs. ANCHORAGE SCHOOL DISTRICT, ANCHORAGE EDUCATION ASSOCIATION, and CHANCEY CROFT and JOHN PATTERSON as individuals Defendants.	Case No.: A94-385 CIV (JWS) **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT PATTERSON'S MOTION FOR SUMMARY JUDGMENT**

LEGAL STANDARD

Pursuant to Federal Rules of Civil Procedure, Rule 56, summary judgment may be granted only if there is no genuine issue as to any material fact and judgment for the moving party would be proper as a matter of law.[1] Initially the burden of proof on a summary judgment

[1] *See*, Federal Rules of Civil Procedure, Rule 56(c)

motion is on the requesting party to establish that it is entitled to judgment as a matter of law on the basis of its proof that no genuine issue of material fact exists.[2]

Only if a moving party meets its initial burdens of proof, *then* the opposing party may not rest on factual allegations of its pleadings, but instead, " . . . must set forth specific facts showing there is a genuine issue for trial."[3] The facts on which the opposing party relies must be admissible at trial but the facts do not need to be admissible form as presented in its opposition.[4] The opposing party's evidence must be sufficient to create a genuine issue for trial.[5] If the evidence is sufficiently probative to permit a reasonable trier of fact to find in favor of the opposing party, then summary judgment must be denied.[6]

ARGUMENT

Plaintiff asserts that Defendant, John Patterson (hereinafter "Patterson"), has not met his initial burden of proof requirement on any of the five causes of action he

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[2] *See, e.g., British Airways Board v. Boeing Co.*, (9th Cir. 1978) 585 F.2d 946, 951.

[3] Federal Rules of Civil Procedure, Rule 56(e) (In relevant part).

[4] *See, Celotex Corp. v. Catrett*, (1986) 477 U.S. 317, 324, 106 S.Ct. 2548; *Curnow v. The Ridgecrest Police*, (9th Cir. 1991) 952 F.2d 321, 324.

[5] *See, McCabe v. General Foods Corp.*, (9th Cir. 1987) 811 F.2d 1336, 1340.

[6] *See, e.g., Anderson v. Liberty Lobby, Inc.*, (1986) 477 U.S. 242, 249-250, 106 S.Ct. 2505, 2512.

challenges.[7] Plaintiff also asserts that the evidence presented in opposition is highly probative of the material issues presented here, and clearly and convincingly support the allegations stated by the verified Complaint in the case at bar.

Existing in this case are disputed material facts, or inferences to be drawn from the facts presented as necessary to conclude the ultimate fact, to return a judgment for Plaintiff on the four causes of action against Patterson

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[7] Plaintiff asserts that all or nearly all of the evidence presented by Patterson is inadmissible over evidentiary objections timely raised by Patterson and may not be considered by the court in ruling upon Patterson's motion. *See, FDIC v. New Hampshire Ins. Co.*, (9th Cir. 1991) 953 F.2d 478. More importantly, Plaintiff asserts and establishes by competent evidence presented herewith in opposition to Patterson's motion that genuine issues of material fact are present as to four of the five causes of action, and that summary judgment against Patterson and for Plaintiff, if and when requested, may be properly entered based upon Plaintiff's showing of undisputed material fact of Patterson's breach of contract of not providing and at relevant times refusing to provide certain identifiable, contracted for, legal services.

NOTE: The court will note a significant difference in the scope of facts presented by the litigants, both as measured in: 1) the time-frame of events, and: 2) in the extent of the work contracted to perform. Patterson's motion omits completely any reference to two-thirds of the task he began by filing the 1989 civil Complaint in Alaska Superior Court case number 3AN-89-8657 CI (breach of contract and tort damages), and concentrate upon only one-third of his task and a narrow time period of the events occurring between June-September 1992 (the genuinely disputed issue of real or illusory reinstatement of the Plaintiff to her tenured teaching position).

for negligence, fraud, conspiracy, and negligent or intentional infliction of emotional distress. The disputed material facts must be resolved by examination of all the evidence, by determination of ultimate facts drawn from reasonable inferences, and by decision of the jury to be selected in this action. On the breach of contract cause of action, Plaintiff presents in this opposition, competent evidence to establish a clear breach of contract by Patterson.

I.

BREACH OF CONTRACT

Elements of a breach of contract cause of action are: (1.) existence of an enforceable contract, (2.) failure by a party to fully perform all duties required by the contract's terms (breach), and (3.) damages resulting from the breaching party's non-performance of contractual duties.

A. Element One: Enforceable Contract

Patterson does not dispute the material fact that he was party to an enforceable contract to provide legal services on behalf of Plaintiff.[8] Patterson admits beginning performance of his contractual duties by filing a lawsuit "on behalf of plaintiff against the Anchorage

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[8] *See,* Patterson's Answer to Plaintiff's Complaint (hereinafter, "Patterson's Answer"), p. 7, paragraph 85, lines 1-7; Defendant Patterson's Memorandum In Support Of Motion For Summary Judgment (hereinafter, "Patterson''s Memorandum"), p. 2, lines 10-18.

School District. . . . "[9] Examination of the Complaint prepared and filed by Patterson in that lawsuit, reveals that Patterson contracted to perform certain identified duties. Counts III and IV, respectively, of that Complaint allege breach of contract and tortious conduct by ASD.[10] The Complaint's prayer seeks two forms of monetary damages against ADS.[11] Damages for the breach of employment contract would obviously include "back-pay" and remuneration for salary earned but wrongfully withheld by ASD. Tort damages were requested in an amount "in excess of $35,000."[12] It is not disputed that Patterson had knowledge of the continuing viability of Plaintiff's unrealized damages causes of action against ASD[13] and that he refused to pursue the monetary damages.[14] These acts occurred in 1992. In 1990-91, Patterson ceased pursuit on the entire case, resulting in the court's issuance of a Notice and Order Of Dismissal for lack of prosecution.[15] Only Plaintiff's diligence and independent discovery of Patterson's failure to prosecute her claims, and retention of counsel to investigate and jolt Patterson into continuing representation on he behalf,[16] prevented

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[9] *See*, Patterson's Memorandum, p. 2, lines 14-15.

[10] Exhibit 1, pp. 6-7, lines 20-28, 1-25.

[11] Exhibit 1, pp. 7-8, lines 26-28, 1-12.

[12] Exhibit 1, p. 8, lines 11-12.

[13] *In Camera* Exhibit 106, p. 2, first paragraph.

[14] *In Camera* Exhibit 106, p. 2, second paragraph.

[15] Exhibit 2

[16] *In Camera* Exhibits 108, 109; Declaration of Sherry L. McGinnis, p. 2, lines 18-24.

Patterson's dereliction from resulting in earlier devastating harm to Plaintiff's interests.[17]

By May 1992, Patterson clearly had only partly performed on one duty for which he had contracted. At this late date, Patterson evidenced his ongoing, firmly-held conviction that ASD had no intention to re-employ Plaintiff and would use tactics to accomplish its goal.[18] In May 1992, Patterson also displays an about-face position on contract and tort damages against ASD than the position evidenced by the Complaint and prayer for damages he filed in case number 3AN-89-8657.[19] Lastly, Patterson evidences his intent to cease pursuit of the lawsuit he initiated on Plaintiff's behalf even though he knew: (1) ASD intended to use lawsuit he initiated on Plaintiff's behalf even though he knew: (1) ASD intended to use tactics to avoid reinstating Plaintiff, (2) ASD was at that time, in fact, using tactics including an asserted, but false, untimely response by Plaintiff to a "notice" purportedly given to Plaintiff regarding a return to a teaching position, and; (3) no contract or tort damages had yet been

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[17] Following four (4) recorded contracts by attorney Hemenway between December 27, 1991 and February 5, 1992, Patterson filed a late Response, 31 days after the court's issuance of the Notice. See, *In Camera* Exhibit 108; *and see,* Exhibit 3. Following briefing of the issue, the court issued its Order Reinstating Case on March 7, 1992. *see,* Exhibit 4.

[18] *In Camera* Exhibit 103, p. 1, first paragraph; *see also,* Exhibit 5, p. 28, lines 15-17; p. 39, lines 5-9.

[19] *Contrast, In Camera* Exhibit 103, p. 1, paragraph numbered 1, and p. 2, last paragraph with Exhibit 1, pp. 6-8.

recovered but the Complaint admittedly sought contract and tort damages.[20]

CONCLUSION

Despite the fact that Patterson ultimately failed to accomplish any of the tasks for which he was hired, Patterson arguably deprived Plaintiff of competent assistance of counsel, in breach of his contractual duties, beginning as early as in the Fall of 1990. Plaintiff does not dispute that a partial summary judgment ordering reinstatement was eventually entered against ASD. It is obvious that Patterson's representation, regardless of its level of competence, assisted in obtaining the summary adjudication on one cause of action only.

Patterson contracted to perform three specific contractual duties: (1.) secure Plaintiff's right to return to her tenured teaching position, (2.) obtain all contract damages due Plaintiff as a result of ASD's wrongful 1989 termination, (3.) obtain all tort damages due Plaintiff as a result of ASD's wrongful 1989 termination. Of the three duties, Patterson did nothing to obtain contract or tort damages. Patterson partially performed the duty of gaining reinstatement, but he ceased all performance once during the three year litigation period leading up to a summary judgment for Plaintiff, and then refused any meaningful performance despite his knowledge of the facts confirming ASD's use of tactics to avoid re-employing Plaintiff just as Patterson, himself believed that ASD would do so.

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[20] *In Camera* Exhibit 106, p. 1, first paragraph.

II.

Negligence

Elements of a cause of action for negligence are: (1.) a duty owed by one to another, (2.) breach of the duty owed, (3.) actual and proximate causation, and (4.) resulting damages.

Element one: Duty

Patterson does not dispute the existence of a contract to perform legal services on behalf of Plaintiff. The element of duty is established by virtue of the contract's existence.[21] Independently from the duty created by contract. Patterson's duty can also be established from Patterson's undisputed act(s) of undertaking to provide legal representation.[22]

Element Two: Breach

The standard of care owed to Plaintiff was that of a competent attorney practicing in the Anchorage community. A competent attorney would not likely need to enlist

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[21] *See, e.g.*, Black's Law Dictionary, 505 (6th Ed. 1990); *see also*, Restatement: (Second) of Torts, § 4.

[22] "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." *H.R. Moch Co. v. Rensselaer Water Co.*, (Court of Appeals of New York, 1928) 247 N.Y. 160, 159 N.E. 896 (Cardozo, C.J., For The Court).

a layperson client to conduct vital legal research,[23] would not file an action but fail to conduct one iota of discovery from the defendants in the case,[24] would not drop out of the case and fail to communicate with the client thereby forcing the client to retain additional counsel to "remind" the client's attorney to perform his or her legal duties,[25] would not abandon the client again prior to conclusion of the lawsuit and prior to achieving any of the three goals hired to achieve;[26] and would not make false statements of fact and law to the client in blatant disregard of the client's best interests.[27]

All of the conduct identified immediately above, and in the foregoing analysis of the breach of contact, [sic] is not an exhaustive listing, but rather is an outline of the major factual events setting forth the numerous ways in which Patterson breached the standard of care he owed to Plaintiff.

Element Three:
Causation

Both direct and proximate cause are clear. Patterson was hired to do a job that he failed to do and that he knew he had failed to do. The partial summary judgment for Plaintiff against ASD indisputably establishes that

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[23] Declaration of Sherry L. McGinnis, pp. 1-2, lines 23-28, 1-5.

[24] Declaration of Sherry L. McGinnis, p. 2, lines 6-9.

[25] *In Camera* Exhibit 108, and 109.

[26] *In Camera* Exhibit 106, p. 2, second paragraph.

[27] *In Camera* Exhibit 107.

ASD wrongfully terminated Plaintiff in 1989.[28] Therefore, Patterson had: (1.) an *unconditional* legal right to be restored to her tenured teaching position, and; (2.) since the termination had been judicially declared wrongful,[29] an even clearer basis to support her right to damages and to be made whole again for the contractual breach and tortious misconduct of ASD. But, for Patterson's failure to utilize due care, Patterson would have secured Plaintiff's tenured position and would have recovered the contract and some or all of the $35,000.00-plus tort damages he initially set out to recover.

Element Four:
Damages

There is no dispute that Patterson did not recover one cent of contract or tort damages for Plaintiff.[30] Patterson even failed to recover over $2,000.00 in wages already earned by Plaintiff but not received, partly as a result of Patterson's derelict instruction to Plaintiff to not cash certain checks sent to Plaintiff by ASD.[31] Even Patterson undeniably acknowledged that perhaps most important

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[28] The Order Granting Summary Judgment uses the terms "contention without merit" and "improperly terminated" to describe ASD's arguments and conduct to wrongfully terminate Plaintiff's employment in 1989. *See*, Exhibit 6, p. 2.

[29] *See*, Exhibit 6.

[30] *In Camera* Exhibit 104, first and second paragraphs.

NOTE: Heresay testimony of Mark Jones offered as Patterson's Exhibit B, further evidences the fact that no contract damages were restored to Plaintiff. *See*, Patterson's Exhibit B, p. 4, section 9. (a), first paragraph.

[31] *In Camera* Exhibit 102, third paragraph.

of all, Plaintiff has been damaged by the wrongful deprivation "future employability" which in this case means years of professional development and advancement opportunities in her rightful position as a tenured educator of Anchorage's children.[32]

III.

NEGLIGENT OR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Plaintiff asserts that evidence produced in this case establishes something greater than negligent conduct by Patterson. Time after time, Patterson is identified as having direct knowledge of facts, and of his disregard of those known facts, when engaging in careless, reckless, or intentional conduct likely to result in great harm to the Plaintiff.

Major injury and a series of surgeries and long duration of physical rehabilitation and recovery is traumatic. Wrongful deprivation of tenured professional employment is a highly traumatic, emotionally stressful event in one's life. Patterson had knowledge of Plaintiff's injury and unjust employment termination.[33] Patterson, himself, had advocated the egregious nature of ASD's conduct in its treatment of Plaintiff.[34] Patterson knew that the entire

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[32] Exhibit 5, p. 38, lines 15-20.

[33] Exhibit 5, p. 5, lines 4-6; p. 9, lines 23-25; p. 21,. lines 15-16; p. 43, lines 21-23.

[34] Exhibit 5, p. 5, lines 10-12, 20-22; p. 7, lines 5-14; p. 11, lines 9-13; p. 15, lines 9-10; p. 16, lines 9-10; p. 23, lines 7-13; p. 28, lines 15-17; p. 36, lines 21-22; p. 37, lines 8-10; p. 39, lines 5-9.

series of events had left Plaintiff in a vulnerable emotional state of mind.[35]

CONCLUSION

A trier of fact is necessary to make the required determination of the scienter Patterson possessed, based on the entire realm of facts known to him when he acted or failed to act as alleged.[36] All reasonable inferences must be drawn in the opposing party's favor where the underlying facts are either disputed or not in controversy; *e.g.*, at the summary judgment stage the opposing party's version of disputed factual issues is presumed correct.[37]

Either carelessly, recklessly, or with intent, Patterson acted or failed to act as Plaintiff has alleged and established by the introduction in this opposition of evidence of Patterson's conduct directed toward Plaintiff during the relevant time period from 1989 through 1992.

IV.

CONSPIRACY AND FRAUD

Reasonable inferences drawn from the foregoing introduction of facts and from the introduction of the

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[35] Exhibit 5, p. 9, lines 23-25; p. 43, lines 21-24.

[36] *See, Anderson, supra,* 477 U.S. at 249-255.

[37] *See, eg., Eastman Kodak Co. v. Image Technical Services, Inc.,* (1992) 504 U.S. 451, 112 S.Ct. 2072; *T. W. Elec. Serv. v. Pacific Elec. Contractors Ass'n.* (9th Cir. 1992) 958 F.2d 881, 888.

facts as referenced in this section, lead to one unmistakable conclusion: clear and convincing evidence of conspiracy and fraud is present and in support of the allegations of Plaintiff's Complaint.

OVERVIEW OF EVENTS OCCURRING 1989 THROUGH 1992

Patterson does not dispute he had knowledge of Plaintiff's acceptance to a California law school and relocation to attend classes. It is after gaining knowledge of this fact that Patterson stopped communicating with Plaintiff, stopped pursuit of Plaintiff's lawsuit against ASD, and communicated to Plaintiff his threat to cease further representation of her claims unless she accepted a proposed ASD settlement offer that Plaintiff found unacceptable.[38] During this same time period ASD gained knowledge of Plaintiff's acceptance to a California law school and relocation, by virtue of ASD's contact with Plaintiff's attorney, Defendant Chancey Croft, in Alaska workers' compensation administrative proceedings, for reimbursement of $100,000.00-plus dollars in necessary medical expenses. Much later, Plaintiff discovers that on or about November 11, 1990, Defendant attorney, Chancy [sic] Croft, had filed his withdraw from further representing Plaintiff in the worker's compensation action without the notice to, or the consent of, Plaintiff.[39]

The totality of evidence presented reflects an unmistakable shift from approximately October 1990, to the

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[38] *In Camera* Exhibit 101, p. 2, first paragraph.

[39] Declaration of Sherry L. McGinnis, p. 3-5.

present, in the actions and statements of Plaintiff's prior representatives Patterson and AEA employees. At all times prior to October 1990, Patterson and AEA advocate the egregiousness of ASD's conduct toward Plaintiff.[40] AEA employee O'Leary refers to ASD's treatment of Plaintiff as "illegal" in correspondence with ASD personnel.[41] After October 1990, a perceptible shift occurs in the position of Patterson and AEA. In December 1990, Patterson threatened to withdraw legal assistance unless Plaintiff accepts a settlement offer proposed by ASD.[42] Then during an entire one year period, from December 1990 to January 1992, Patterson largely ignores Plaintiff's attempts to communicate with him. Worried about the status of her lawsuit, Plaintiff hires an attorney.[43] Following contact by the attorney, Patterson takes action to prevent dismissal of Plaintiff's lawsuit.[44]

In May 1992, Patterson confirms his belief that ASD will continue its pattern of deceitful conduct toward Plaintiff and steadfastly continue using every effort to avoid reinstating Plaintiff's employment.[45] Regardless, at the May 1992 juncture, Patterson conveys a 180 degree

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[40] Exhibit 1, p. 7, lines 14-17, 24-25; p. 8, lines 9-12; Exhibit 5, p. 5, lines 20-22; p. 7, lines 13-14; p. 11, lines 9-11; p. 15, lines 9-10; p. 23, lines 7-13; p. 28, lines 15-17; p. 36, lines 21-22; p. 37, lines 8-10; p. 39, lines 5-9.

[41] Exhibit 5, pp. 64-65. (Unmarked exhibit of letter of Elizabeth S. O'Leary accompanying the summary judgment motion in case number 3AN-89-8657.)

[42] *In Camera* Exhibit 101, page 2, first paragraph.

[43] *In Camera* Exhibits 108 and 109.

[44] Exhibit 3.

[45] *In Camera* Exhibit 103, first paragraph.

changed position regarding tort and contract damages from that evidenced by the Complaint he prepared over two years prior on behalf of Plaintiff. Patterson also instructs Plaintiff to deal directly with ASD in regards to her employment position.[46]

What event occurred in the Fall of 1990 to cause the shift in Patterson's (and Defendant Croft's) conduct in representing Plaintiff? Simply, indisputably, Patterson gained knowledge of Plaintiff's acceptance to a California law school and relocation to California. By forming a reasonable inference from these facts, a fair minded jury is highly likely to conduct that Plaintiff's moving to a distant state and embarking on a new professional career path as an attorney, signalled to Patterson and the other defendants that they could avoid further animosity among their peer group, avoid reemploying a dedicated teacher who had upset high level school administrators by exposing misconduct of ASD personnel through grievance process, avoid future "difficulties" by these attorney defendants in inevitable future dealings with the powerful school district, avoid what had obviously revealed itself to be "hard work" on Plaintiff's behalf and against a "Goliath" school district that had at all times displayed animus and egregious misuse of its resources and power in dealing with Plaintiff, and in order to avoid restoring Plaintiff to a pre-damaged state. The stakes in this care [sic] are no "small potatoes." Many men and women have been corrupted by much less than the tens or even hundreds of thousands of dollars of exposure ASD faced after its 1987 [sic] and forward blatant disregard of ASD's legal

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[46] *In Camera* Exhibit 104, first paragraph.

rights. To coin a contemporary phrase, "it doesn't take a rocket scientist" to infer that Patterson and the other defendants likely saw an opportunity created by Plaintiff's undertaking to attain a new professional career in a distant forum State. After all, isn't it reasonable that Plaintiff would "forget about" returning to Alaska to teach, since she was now in sunny Southern California paradise with its myriad of distractions and the promise of a high-powered, potentially lucrative, new career as a respected California attorney?

Plaintiff argues that the Defendants took the easy way out and "cut a deal" to the benefit of everyone except the Plaintiff, and perhaps even shared in some "pot" of money to sweeten the deal and distract the conscience is not just a plausible scenario based on the evidence present in this case; it is the likely conclusion of a majority of reasonable jurors. Plaintiff has discovered through investigation connected to this action that in 1990-91, Defendant Croft received more than eleven thousand dollars from ASD in payment of his legal fees and that he filed a withdraw soon thereafter.[47] This fact further supports a reasonable inference that money may have also changed hands between ASD and Patterson (and AEA) leading to Patterson's sudden threats to withdraw, and arguably actual withdrawal of effective assistance of counsel as early as October 1990.

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[47] Declaration of Sherry L. McGinnis, p. 3, lines 6-8.

SPECIFIC EVENTS OCCURRING JUNE THROUGH AUGUST 1992

Fast-forward on the timeline to the events to June-August 1992: (1.) ASD learns of the summary judgment ordering full reinstatement, (2.) ASD's failure at all times June-August to provide Plaintiff with a contract and necessary teaching materials, including, upon Plaintiff's relocation to Alaska and appearing for work as instructed by ASD; (3.) Patterson, AEA, and ASD engaged in an Abott [sic] & Costello like, thinly veiled act of "who's got the contract" while telling Plaintiff "you've got the contract" despite their knowledge that Plaintiff did not have, and had at all times been denied, a contract; (4.) Patterson, AEA, and ASD furiously write letters attempting to cover-up their bad conduct by a concerted effort to shift blame to one another and/or the Plaintiff. Their claim that they provided a contract of employment to Plaintiff is spurious. It is clear from the fact that a contract was never shown, nor offered, to Plaintiff. The contract ASD subsequently created is nothing more than an afterthought, a ploy, an after-the-fact cover-up tactic.

The fall-out reveals further evidence of misconduct through what in hindsight appears to be a less than perfect cover-up effort by all Defendants. These events are set in motion by Plaintiff, when, to everyone's surprise in the Fall of 1992, she notifies all Defendants that she will return to Anchorage to receive the benefit of the summary judgment's order of full reinstatement. The events occur as follows:

1. Patterson elects to refuse legal representation contracted to perform.[48]

2. Patterson admits that Plaintiff followed his directives by contacting ASD directly and otherwise cooperating with all ASD requirements to return to work.[49]

3. Plaintiff was denied a contract and access to books and other necessary teaching material at all times prior to, and upon the event of reporting for work at the specified time and location at ASD's facility.

4. In the absence of a contract, Plaintiff left ASD's facility. At all times subsequent, ASD informed Plaintiff through Patterson and AEA representative, Mark Jones, that it had imposed additional conditions and restrictions on Plaintiff's ability to return to teaching for ASD.[50]

5. There is no dispute that Patterson was promptly informed of these facts following their occurrence.[51]

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[48] *In Camera* Exhibit 106, p. 2, second paragraph. Also note that by this time, Patterson is talking out of both sides of his mouth regarding Plaintiff's reinstatement. On the one hand he indicates he will continue to pursue reinstatement. *Id.* On the other hand he instructs Plaintiff to make all future contact regarding reinstatement with ASD directly. *In Camera* Exhibit 104, first paragraph; *In Camera* Exhibit 106, p. 2, first paragraph.

[49] *See*, Patterson's Memorandum, pp. 4-5, lines 7-25, 1-5.

[50] *See* Patterson's Exhibit B, pp. 3-4, section numbered "8.".

[51] *See*, Patterson's Memorandum, p. 5, lines 12-13.

6. Remarkably, in spite of knowledge of the true facts, Patterson, in essence, calls Plaintiff a "liar" and tries to bewilder and perplex his client by a series of distortions of both fact and law.[52]

As Patterson had advocated based on his knowledge of its prior egregious conduct toward Plaintiff, ASD was waging a war of tactics in a continuing effort to avoid re-employing Plaintiff by erecting an unlawful, and insurmountable obstacle course for Plaintiff to navigate in her efforts to secure the right *unconditionally* returned to her by order of the trial court. There is no doubt that a jury may reasonably conclude from inferences based upon a complete examination of the history of ASD's conduct toward Plaintiff, and upon a timeline of circumstantial, factual events leading to and through the conduct of Patterson and others in 1992, that a conspiracy and fraudulent conduct deprived Plaintiff of her legal rights.

CONCLUSION

Plaintiff argues that Patterson's conduct and cover-up attempt evidences a conspiracy by Patterson, ASD, and others to perpetrate a fraud upon Plaintiff and deprive her of rights bestowed by the summary judgment and to which she was otherwise entitled. Conspiracy and fraud are sinister acts, rarely proven upon admissions by the co-conspirator. Inferences must be drawn from various sources and pieces of circumstantial evidence. all reasonable inferences must be drawn in the opposing

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[52] *In Camera* Exhibit 107; *see also*, Patterson's Memorandum, p. 5, lines 13-18.

party's favor where the underlying facts are either disputed or not in controversy; *e.g.*, at the summary judgment stage the opposing party's version of disputed factual issues is presumed correct.[53] Plaintiff has outlined for the court a timeline and series of factual events which lead to reasonable inferences supporting Plaintiff's factual allegations as to all five causes of action which Patterson has challenged. Patterson's motion lacks the threshold evidentiary showing to meet his initial burden of proof. Regardless, Plaintiff has introduced in this opposition the required evidentiary showing to support all allegations made regarding Patterson's improper conduct causing damages to Plaintiff. Patterson's motion for summary judgment must be denied in its entirety.

Respectfully submitted.
Dated: January 3, 1996

/s/ Sherry L. McGinnis
Sherry L. McGinnis

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[53] *See, e.g., Eastman Kodak Co., supra,* 504 U.S. 451; *T. W. Elec. Serv., supra,* 958 F.2d at 888.

APPENDIX S

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

SHERRY L. McGINNIS, Plaintiff, vs. ANCHORAGE SCHOOL DISTRICT, ANCHORAGE EDUCATION ASSOCIATION and CHANCY CROFT PATTERSON, as individuals, Defendants.	Case No. A94-385 CV (JWS) ORDER FROM CHAMBERS (Motions for Summary Judgment – Dockets 80, 85, 104; Motions to Strike – Dockets 121, 127, 139 & 153; Motion to Dismiss and Alternative Motion to Compel – Docket 147; Application for Substitution of counsel – Docket 174; Amendment of Planning and Scheduling Order) (Filed Jul. 05, 1996)

I. MOTIONS PENDING AND OTHER MATTERS ADDRESSED

At Docket 80, defendant Anchorage Education Association ("AEA") moves for summary judgment dismissing all claims brought by plaintiff Sherry L. McGinnis against AEA. At Docket 85, defendant Anchorage School District ("ASD") moves for summary judgment dismissing all claims brought by McGinnis against ASD. At Docket 104, defendant attorney John Patterson moves for

summary judgment dismissing all claims brought by McGinnis against him. These issues have been fully briefed. No party has requested oral argument, and it would not be of material aid to the court.

At Docket 121, McGinnis objects to evidence and moves to strike exhibits Patterson has submitted to support his summary judgment motion. At Docket 127, McGinnis moves to strike exhibits submitted by AEA and ASD to support their summary judgment motions. Defendants have relied on those materials but have not specifically opposed these motions. At Docket 139, Patterson objects to and moves to strike Exhibits 101 through 109. This motion has been fully briefed but is moot.

At Docket 147 defendant Chancy Croft moves to dismiss McGinnis' complaint against him for failure to prosecute and in the alternative to compel discovery. At Docket 153, McGinnis moves to strike Croft's motion to dismiss and Croft's request for discovery as untimely under the existing planning and scheduling Order.

At Docket 174, Steven C. Finley asks to appear *pro hac vice* for McGinnis without association of local counsel. This request has been opposed. The disposition of the preceding matters has caused the court to conclude that modifications to the planning and scheduling order are required. The necessary modifications are set out below.

II. FACTS

A. Background

On August 25, 1994, McGinnis filed a complaint in this court against ASD, AEA, Croft and Patterson.[1] The complaint alleges that McGinnis suffered an accident on ASD premises while engaged in duties related to her job as a high school teacher for ASD. Although injuries to her spine required major surgery, ASD would not accommodate her disability, refused to pay for her surgery, and wrongfully terminated her employment in April, 1989.

In August, 1989, AEA retained and employed Patterson to represent McGinnis. Patterson filed a complaint against ASD in state court, alleging wrongful termination and seeking: (1) a declaration that ASD's notice of termination was ineffectual, that McGinnis did not impermissibly fail to seek an administrative hearing and that ASD should provide her with a hearing; (2) an order that ASD breached its contract with McGinnis; and (3) an order that ASD's breach of agreement was wrongful and violative of public policy and a wrongful interference with her employment contract; and (4) an award of damages in excess of $35,000.

Meanwhile, McGinnis moved to California to attend law school. According to McGinnis, although Patterson initially advocated the egregiousness of ASD's conduct toward her, when he became aware that McGinnis had moved to California to pursue a new profession, he stopped communicating with her, stopped pursuing her

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[1] Jurisdiction is based on diversity of citizenship. 28 U.S.C. § 1332.

lawsuit against ASD, and threatened to cease further prosecution of her claims unless she accepted a proposed settlement offer that she found unacceptable. More specifically, the December 10, 1990, letter to which McGinnis refers in support of this allegation discussed the proposed stipulation between ASD and McGinnis and informs her that it accomplishes more than she could accomplish in court, because it allows her to be on leave-without-pay for an indefinite period of time. In the letter, Patterson informs McGinnis that he cannot pursue her claim that ASD was withholding money, because that claim has nothing to do with her present lawsuit, which is designed to reinstate her as a teacher in the district. The letter advises McGinnis that her position with respect to negotiations jeopardizes the lawsuit and compromises him, and that he told AEA he would move to withdraw as her attorney if she did not accept the settlement.

McGinnis became concerned about the status of her lawsuit and hired attorney Andrew Hemenway. Hemenway discovered that on January 6, 1992, the court issued a notice and order of dismissal for lack of prosecution. According to McGinnis, Hemenway had to contact Patterson to "jolt" him into continuing pursuit of her case. Patterson ultimately took action to prevent dismissal, arguing to the court that the parties were in settlement negotiations and that ASD must respond to or oppose McGinnis' summary judgment motion. On June 16, 1992, after concluding that ASD had wrongfully terminated McGinnis, the court granted summary judgment and ordered reinstatement with no break in service.

On July 8, 1992, McGinnis wrote to Patterson, stating that she was making arrangements to return to Alaska

from California to resume her teaching position in August of that year, and asking what was required to reinstate her assignment. Patterson advised her to contact ASD's personnel office. He told her he would not represent her beyond the point of achieving her reinstatement, that reinstatement had been accomplished, and that whether she is actually reinstated was in her hands. On July 27, 1992, McGinnis wrote a letter to Edward Lindquist, ASD's Executive Director of Personnel, stating that she was anxious to resume teaching, and asking for details of her assignment and a copy of her contract. McGinnis wrote to Lindquist again on August 7, 1992, and again on August 20, 1992 discussing her contract. In the August 20, 1992 letter, McGinnis told Lindquist she had received a call from Karen with ASD's personnel department, who told her she had a contract ready to be singed and that the contract and her benefits package would be available at West High School upon her arrival Tuesday morning, August 25, 1992.

McGinnis testified in her deposition that when she reported to West High School, the contract was not there, and Principal Lance Bowie told her to contact ASD offices to get the contract. However, she did not contact anyone or go to the ASD offices, did not remain at West High School and did not attend the scheduled teachers' in-service program. Instead, she left the school premises and never returned. Patterson advised her that she had a contract with ASD by virtue of the court's order and that even though a written contract had not been tendered to her, she must go back to the school and must contact ASD's personnel department. A few days later, Patterson advised McGinnis it was his understanding that she had

a written contract and should return to work as soon as possible. McGinnis never contacted nor met with ASD personnel.

On August 31, 1992, Lindquist informed McGinnis that her employment with ASD had been terminated due to unauthorized absences. The letter states in pertinent part:

> It was reported that you arrived at your assignment at West High School on Tuesday morning, August 25, told the principal you would not work without a signed contract, and you were directed to go to the Personnel Department to take care of the matter.
>
> You have neither come to the Personnel Department nor returned to your assigned location at West High School. Further, you have not contacted any District official during the period of time. Efforts to contact you have been futile since you have provided no phone number at which you can be reached. Your conduct in this matter has been clearly unprofessional.
>
> You have now been absent from work for five days without authorization; consequently, in accordance with Alaska Statutes Sec. 14.20.170a(3) and School Board Policy 537.61, you have been terminated. A copy of these provisions is attached.
>
> You may request a hearing before the School Board concerning your termination, if within 15 days after receipt of this notification, you submit a written request for the hearing according to the procedure which is explained in the attachment to this letter.

(Docket 104; Exh. O). McGinnis did not request a hearing before the School Board. Instead, she filed action in this court, raising the following claims: The first cause of action is against ASD for discrimination in employment. The second cause of action is against ASD for discharge in violation of public policy. The third cause of action is against ASD for misrepresentation of fact to induce relocation for employment purposes. The fourth cause of action is against ASD for breach of the implied covenant of good faith and fair dealing in an employment relationship. The fifth cause of action is against ASD for conversion. The sixth cause of action is against ASD, AEA and Patterson, for intentional misrepresentation of fact. The seventh cause of action is against AEA and Patterson for breach of contract. The eighth cause of action is against AEA and Patterson for negligence. The ninth cause of action is against Croft for breach of contract. The tenth cause of action is against Croft for intentional misrepresentation of fact. The eleventh cause of action is against Croft for negligence. The twelfth cause of action is against Croft for conversion. The thirteenth cause of action is against ASD, AEA and Patterson for conspiracy. The fourteenth cause of action is against ASD and Croft for conspiracy. The fifteenth cause of action is against all defendants for negligent or intentional infliction of emotional distress.

B. Affidavits Submitted

1. Elizabeth O'Leary

From 1987 to 1991, O'Leary was a "Uniserv" Director for NEA-Alaska, Inc., the state affiliate of NEA for

Alaska's local teachers' unions, including AEA. O'Leary reported to NEA-Alaska's Executive Director Robert Manners and to NEA-Alaska's Board of Directors. She was neither supervised nor evaluated by AEA, and her pay checks were drawn upon an account of NEA-Alaska. On June 19, 1989, McGinnis met with O'Leary and told her that ASD had terminated her in April of 1989, and she wanted AEA's assistance to be reinstated. O'Leary explained her options. McGinnis addressed her correspondence with O'Leary in care of NEA-Alaska. On July 27, 1989, O'Leary wrote to Lindquist, stating that McGinnis was wrongfully terminated and is entitled to workers' compensation for an on-the-job injury, and requesting to know whether McGinnis can expect to return to full employment with ASD. NEA-Alaska decided to assist McGinnis and engaged Patterson to represent her. O'Leary denies having participated in any conspiracy against McGinnis.

2. Mark Jones

Mark Jones is also a Univerv Director, employed by NEA-Alaska, not AEA. Although a principal task of his is to assist AEA and its members, he is neither paid nor supervised by AEA. It was reported to Jones that McGinnis went to West High on August 25, 1992, but left the premises when she discovered that a written contract was not waiting for her in the building. The next day, Patterson informed Jones that McGinnis had left, and Jones advised McGinnis to return to work. When Jones contacted Lindquist to obtain the contract, Lindquist told him a conference would be necessary to discuss

McGinnis' absence from her duty station at West High. Jones wrote to McGinnis on August 31, 1992, warning her of the consequences of her actions and advising her to respond to ADS's request for a meeting and then return to work. Jones also wrote to McGinnis on September 3, 1992, alerting her of her rights and the deadline for her to request a hearing. Jones denies ever having been involved in any conspiracy to injure McGinnis. According to Jones, NEA-Alaska, not AEA, selected and paid Patterson.

III. DISCUSSION

A. Motions to Strike

1. Docket 121

At Docket 121, McGinnis moves to strike evidence submitted with Patterson's summary judgment motion. She objects to Exhibits A and B on grounds of hearsay; to Exhibit E on "[a]ll applicable procedural and evidentiary objections preserved at the deposition of Plaintiff to testimony provided in response to improper deposition questions;" to Exhibits F, G and M on grounds of attorney-client privilege, hearsay, best evidence, and lack of foundation or authentication; and to Exhibits H, I, J, K, L, N, and O on grounds of hearsay, best evidence, and lack of foundation or authentication. No opposition was filed. The court finds that none of these objections has merit.

Submitted with Patterson's summary judgment motion is the affidavit of Craig F. Stowers, counsel for Patterson. Stowers avers that Exhibit A is a true and accurate copy of O'Leary's affidavit, Exhibit B is a true

and accurate copy of 'Jones' affidavit, Exhibits D and F through O are true and accurate copies of letters, documents, and notes produced by McGinnis in the course of discovery or were identified by her in her deposition, and Exhibit E contains true and accurate copies of pages selected form the McGinnis' deposition.

Exhibit A is O'Leary's affidavit and Exhibit B is Jones' affidavit. None of the statements contained in these affidavits is hearsay; the statements are not offered to prove the truth of the matter asserted, but, rather, to show that communications were made. Fed.R.Evid. 801(c).

McGinnis raises all objections preserved at the deposition. However, she submits no evidence to support her assertion that objections were made, and the court cannot glean from the deposition excerpts submitted by Patterson, that McGinnis objected to the statements made or questions asked. Because McGinnis has failed to include any materials in support of this objection, it is overruled.

Exhibit F is an unsigned letter, dated July 8, 1992, and addressed to Patterson form McGinnis, stating that she is making arrangements to return to Alaska in August to resume teaching and asking several questions regarding her reinstatement. Exhibit G is a letter from Patterson to McGinnis, dated July 21, 1992, advising her that if she does not now treat ASD as any other employee would treat it, she will lose the opportunity to go to work as a teacher for ASD. Exhibit M is a letter, dated August 28, 1992, from Patterson to McGinnis, stating his understanding that there is a written contract from ASD and that she

has been invited to sign and return it, and advising that she should report to work.

These letters are not subject to the attorney-client privilege, because McGinnis has put their contents at issue by filing this lawsuit against Patterson. *See Home Indemnity Co. v. Lane Powell Moss and Miller*, 43 F.3d 1322 (9th Cir. 1995). Nor is their content hearsay, because the statements contained therein are not offered to prove the truth of the matter asserted, but, to show that communications were made. Fed.R.Evid. 801(c). With respect to the original letters from Patterson to McGinnis, the best evidence rule is satisfied because the originals are presumably in McGinnis' possession. Fed.R.Evid. 1004(3). With respect to the letters from McGinnis to Patterson, it is not unfair to permit Patterson to submit copies, because the letters are purportedly from McGinnis, and McGinnis offers no proof or argument to raise a genuine question as to their authenticity. Fed.R.Evid. 1003. The letters have been properly authenticated by Stowers' affidavit. Fed.R.Evid. 901(a).

Exhibit H is a letter from McGinnis to Lindquist, dated July 27, 1992, stating that she is anxious to resume teaching with ASD and requesting that he send a contract and details of her teaching position. Exhibit I is a letter form McGinnis to Lindquist, dated August 7, 1992, stating that she spoke with Lance Bowie, principal of West High School confirming her teaching contract with ASD, to begin August 25, 1992. Exhibit J is a letter from McGinnis to Lindquist, dated August 20, 1992, stating that Karen, an employee in the ASD Personnel Department, told her she had a prepared teaching contract ready for McGinnis' signature, and that both her contract and

benefits would be available at West High School upon her arrival on August 25, 1992. Exhibit K appears to be a handwritten note to McGinnis from Patterson, advising her that he has a contract with ASD, even if her written contract was not tendered, and advising her to tender services until he tells her it is clear ASD will not allow her to work. Exhibit L is a memo from Jones to McGinnis, dated August 31, 1992, stating that he fears her failure to respond to ASD's request for a meeting and her continued unexcused absence form her assigned duty station may result in disciplinary action, and advising her to respond to ASD's request for a meeting and then return to work. Exhibit N is entitled Anchorage School District Certificated Employee's Contract. Exhibit O is a letter from Lindquist to McGinnis, dated August 31, 1992, stating that she had been terminated for being absent from work for five days without authorization, and informing her that she may request a hearing before the School Board within 15 days after receipt of the letter. McGinnis' objections to Exhibits H, I, J, K, L, N and O are all overruled, for the same reasons the court overrules the objections to Exhibits F, G and M.

2. Docket 127

(a) AEA's Exhibits

With respect to those documents submitted to support AEA's summary judgment motion, McGinnis objects to Exhibits J and K on grounds of attorney-client privilege, hearsay, best evidence, and lack of foundation/ authentication; to Exhibits A and H on grounds of hearsay, competency, and best evidence; to Exhibits B and F

on grounds of hearsay, competency, best evidence, and opinion/speculation by a lay witness; to Exhibits E and I on grounds of hearsay, best evidence, and lack of foundation/authentication; to Exhibit G on grounds of hearsay and best evidence; to Exhibit C on grounds of foundation/authentication; to Exhibit L on grounds of relevance, foundation/authentication, and best evidence; to Exhibit M on grounds of relevance, hearsay, foundation/authentication, and best evidence; and to Exhibit D, she applies "all applicable procedural and evidentiary objections preserved at the deposition to Plaintiff to testimony provided in response to improper deposition questions."

With the exception of Exhibits A, B and H, the court need not rule on McGinnis' objections, because the order addressing AEA's summary judgment motion does not rely on the exhibits attached thereto, or because the court has relied on and ruled on McGinnis' objections with respect to copies of the same documents submitted with Patterson's motion. Exhibit A is O'Leary's affidavit, and Exhibit B is Jones' affidavit. As the court ruled above (regarding Docket 121), none of the statements contained in these affidavits is hearsay. It is unclear how McGinnis believes O'Leary and Jones are not competent to offer the statements contained in their affidavits. In any event, the court does not rely on statements regarding Patterson's competence and knowledge as a practitioner, nor on statements regarding AEA or NEA-Alaska's roles in this lawsuit. With respect to McGinnis' objection to Jones' affidavit on grounds of opinion/speculation by a lay witness, it is difficult to determine which statements would constitute opinion or speculation and why they would not be admissible. Again, to the extent that the

affidavit makes statements regarding Patterson's competence or regarding AEA or NEA-Alaska's role in this lawsuit, the court does not rely on Jones' "opinion." McGinnis' objections under the best evidence rule (presumably, to the letters attached to the affidavits – Exhibit "A," the July 10, 1989 letter from McGinnis to O'Leary, and Exhibit "B,", the July 27, 1989 letter from O'Leary to Lindquist) are meritless also. O'Leary's affidavit states that these exhibits are copies of the letters, and McGinnis offers no proof or argument to raise a genuine question as to the authenticity of the copies. As to Exhibit H (September 3, 1992 memo from Jones to McGinnis), McGinnis' objections are overruled for those reasons listed with respect to Exhibits A and B.

With respect to the excerpts from McGinnis' deposition which AEA submits to support its motion, McGinnis raises "all objections preserved at the deposition." However, she submits no evidence to support her assertion that objections were made, and the court cannot glean from the deposition excerpts submitted by AEA that McGinnis objected to the statements made or questions asked, particularly with respect to the excerpts upon which the court relies. Because McGinnis has failed to include any materials in support of this objection, it is overruled.

(b) ASD's Exhibits

With respect to the documents submitted to support ASD's motion, McGinnis objects to Exhibit H on grounds of competency, hearsay, best evidence, and foundation/ authentication; to Exhibit E on grounds of foundation/

authentication, hearsay, and best evidence; to Exhibit I, she applies "all applicable procedural and evidentiary objections preserved at the deposition of Plaintiff to testimony provided in response to improper deposition questions."

The court has ruled on McGinnis' objections to Exhibits E and H (submitted with Docket 80 as Exhibits E and H). Again, regarding those portions of deposition transcripts submitted, there is no evidence that McGinnis raised an objection to the questions posed.

3. Docket 139

At Docket 139, defendant Patterson objects and moves to strike Exhibits 101 through 109, submitted to support McGinnis' opposition to Patterson's motion for summary judgment. Although initially, McGinnis partially redacted these exhibits for *in camera* review, in response to the court's order, she has since filed unredacted copies. Consequently, the motion at Docket 139 is moot.

B. Summary Judgment Standards

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

> [T]he plain language of 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2522 (1986). A "scintilla" of evidence is not enough to create a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986). Nor do "mere allegation and speculation . . . create a factual dispute for purposes of summary judgment." *Nelson v. Pima Community College*, 83 F.3d 1075, 1081-82 (9th Cir. 1996) (citing *Witherow v. Paff*, 52 F.3d 264, 266 (9th Cir. 1995)).

C. AEA's Summary Judgment Motion

1. Intentional Misrepresentation, Breach of Contract and Negligence (claims Six, Seven & Eight)

The complaint alleges that AEA and Patterson ignored their fiduciary duty by misinforming McGinnis regarding her rights to employment with ASD and intentionally seeking to eliminate or reduce their and ASD's exposure to liability by refusing assistance.

AEA argues that no action can lie against it for any misrepresentations attributed to O'Leary, Jones or Patterson, or for breach of contract or negligence attributed to Patterson, because they were not AEA employees or

agents. With respect to O'Leary's alleged misrepresentation, AEA points out that the only false statement McGinnis attributes to O'Leary is the statement she made in 1989, that McGinnis had no remedies at law, and no injury resulted from that statement because McGinnis did not rely upon it. AEA further asserts that these is no evidence that Jones or Patterson made any false representations, and that McGinnis disregarded their advice when she refused to tender the requested services at West High or to go to ASD headquarters to inquire about her contract. AEA argues that McGinnis' claim for breach of contract fails because NEA-Alaska, not AEA, makes all decisions about legal services to a dismissed employee, NEA-Alaska hired Patterson, who acted competently and secured full reinstatement, and McGinnis failed to follow Patterson's advice and to appeal her termination in 1992 to the school board. AEA contends that, for the same reasons, it cannot be held liable for negligently hiring Patterson, because there is no evidence that the selection was imprudent, and AEA cannot be held liable for negligently supervising Patterson, because it had no duty to do so.

McGinnis argues that by accepting her union dues, sending letters on its letterhead on her behalf, and exercising control over processing and manner of pursuit of her claims against ASD, AEA undertook a duty of care to hire competent counsel. McGinnis contends that AEA should have fired Patterson and hired other counsel when he threatened to withdraw in an effort to coerce her to accept an inadequate settlement with ASD, failed to act diligently in pursuing her case, failed to secure the contract effectuating reinstatement of her employment, and

refused to pursue damages against ASD, even though he had alleged them on her behalf in the complaint.

In its answer to the complaint, AEA acknowledges that it provided McGinnis assistance in connection with her action and admits that it offered to obtain assistance for McGinnis in her dispute with ASD. AEA also admits that it contacted Patterson for consultation and invited him to represent her in litigation against ASD in connection with her employment and alleged breach of contract, and that it paid Patterson's fees. AEA also admits that in choosing Patterson, it had a duty of due care, but alleges that it fulfilled this duty.

AEA is correct that there is no evidence of any false representations which harmed McGinnis, by any agent of AEA (including O'Leary, Jones and Patterson who, for the sake of discussion here, are assumed to be AEA agents). The only evidence to support the allegation that ASD had no contract with McGinnis is that a contract was not available at the high school when Karen said it would be. This is some evidence from which an inference could be drawn, but it is too little in light of the other evidence to be credited (i.e., the state court ordered that McGinnis be reinstated and the correspondence between ASD and McGinnis all indicates that she had a contract). In short, McGinnis' argument that she was told she was reinstated but really was not is too implausible to rest on such a slender reed. Therefore, claim six must be dismissed. With respect to AEA's obligation to McGinnis in hiring Patterson, there is no evidence to support a claim that AEA breached its contract with McGinnis or was negligent in selecting, supervising, or failing to fire Patterson. Even if Patterson told AEA he would withdraw if

McGinnis refused to accept the settlement, there is no evidence that the proposed settlement was unreasonable or that it did not resolve those issues Patterson was hired to resolve. Thus, claims seven and eight must also be dismissed.

2. Conspiracy between ASD, AEA and Patterson (Claim Thirteen)

AEA argues that there is no evidence of a conspiracy, because McGinnis has no knowledge as to when an alleged conspiracy began, as to any overt act that was performed in furtherance of it, or as to what steps AEA should have taken after she won her lawsuit and was reinstated. McGinnis presents no argument in opposition to this assertion, nor does the record contain evidence supporting a conspiracy claim against AEA. Consequently, the thirteenth cause of action must be dismissed.

3. Emotional Distress (Claim Fifteen)

The complaint alleges that all defendants knew or should have known that McGinnis' spinal injuries diminished her physical and mental capability and that her physical and emotional conditions were weakened, rendering her more vulnerable to abuse by defendants. In her negligence claim against AEA, McGinnis alleges that as a result of AEA and Patterson's failure to utilize the requisite degree of care on her behalf, she "has suffered and continues to suffer severe emotional injury, manifest by irritability, loss of sleep, increased frequency in

number and intensity of headaches, upset stomachs and other emotionally related physical symptoms."

AEA argues that the evidence does not support McGinnis' claims for negligent or intentional infliction of emotional distress, because McGinnis agrees that no AEA officer or employee of AEA had personal hostility towards her. McGinnis does not respond to this argument, although her affidavit states that she has "continuing illness including headaches, stomach disorders, problems sleeping, and anxiety and depression which are directly related to acts and omissions of ASD and the other Defendants . . . " (Docket 128; McGinnis affidavit).

"Whenever a defendant stands in a contractual or fiduciary relationship with the plaintiff and the nature of this relationship imposes on the defendant a duty to refrain from conduct that would foreseeably result in emotional harm to the plaintiff, the plaintiff need not establish a physical injury in order to recover for the negligent infliction of emotional distress." *Chizmar v. Mackie,* 896 P.2d 196, 203 (Alaska 1995) (citing *Hancock v. Northcutt,* 808 P.2d 251, 257 (Alaska 1991). This rule apples [sic] only to relationships that are "highly personal and laden with emotion," such as "contracts to marry, to conduct a funeral, to sell a sealed casket, to conduct a cesarean birth, to surgically rebuild a nose, to provide promised maternity medical coverage, to provide medical services, and to keep a daughter informed of her mother's health." *Hancock,* 808 P.2d at 258-59 (footnote omitted). The relationship between AEA and McGinnis was not the type of relationship contemplated by *Hancock* or *Chizmar.*

With respect to alleged intentional infliction of emotional distress:

> [O]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress . . . *Croft v. Wicker*, 737 P.2d 789, 792 (Alaska 1987) (quoting Restatement (Second) of Torts § 46(1) (1965)). The elements necessary to support a prima facie cause of action for IIED were set forth in *Teamsters Local 959 v. Wells*, 749 P.2d 349, 357 (Alaska 1988): "(1) the conduct is extreme and outrageous, (2) the conduct is intentional or reckless, (3) the conduct causes emotional distress, and (4) the distress is severe." *See also Cameron v. Beard*, 864 P.2d 538, 548 (Alaska 1993). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Oaksmith v. Brusich*, 774 P.2d 191, 200 (Alaska 1989) (quoting Restatement (Second) of Torts § 46 cmt. d (1964)).
>
> If reasonable jurors could differ as to whether the evidence adduced at trial would satisfy these elements, the superior court is required to submit the IIED claim to the jury. *Teamsters*, 749 P.2d at 357-58. However, as a threshold matter, the court must determine "whether the severity of the emotional distress and the conduct of the offending party warrant an instruction on intentional infliction of emotional distress." *Id.* at 357; *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454, 456 (Alaska 1985).

Chizmar, 896 P.2d at 208-09. Here, there is no evidence and, thus, no reasonable jury could find, that AEA's conduct was extreme and outrageous, intentional or reckless. Claim fifteen must be dismissed.

D. Patterson's Summary Judgment Motion

1. Intentional Misrepresentation (Claim Six)

McGinnis testified that Patterson misrepresented that she would be given her job back if she contacted ASD and made arrangements, and he informed her that she had a contract when he knew she did not. However, McGinnis admits she did not follow Patterson's instruction to contact ASD's personnel office to arrange to sign the contract, and she offers no evidence that if she had followed Patterson's instruction, she would not have been reinstated. Given that the state court ordered reinstatement, and given that all correspondence between McGinnis and ASD indicated that McGinnis had a contract, the evidence does not support McGinnis' assertion that Patterson knew she had no contract. Nor is there evidence that if McGinnis had followed Patterson's advice, she would still have been terminated. Therefore, McGinnis has not established that any alleged misrepresentation caused by any injury, and claim six must be dismissed.

2. Breach of Contract and Negligence (Claims Seven & Eight)

McGinnis alleges that Patterson breached his contractual duties and was negligent when he ceased pursuit of her case, failed to ensure that she was reinstated, failed to

seek compensation for her employment and all benefits appurtenant, failed to seek reimbursement for civil contract and tort damages he alleged in the complaint, and failed to recover the $2,000 in wages by his "derelict instruction" to not cash certain checks ASD had sent her.

Patterson argues that he did not breach his contract and was not negligent, because he obtained summary judgment ordering ASD to reinstate her, and because the evidence establishes that the only reason she was not reinstated was because she refused to contact and cooperate with ASD to arrange to sign her contract. Patterson states that he never agreed to pursue contract or tort damages for McGinnis, nor is there evidence that McGinnis suffered any monetary damages as a result of the 1989 termination, nor is there legal authority supporting the proposition that an attorney's drafting of allegations in a complaint constitutes an agreement that he or she will do a particular thing or accomplish a particular result. According to Patterson, the prayer for damages in excess of $35,000 was a necessary demand to satisfy the then-applicable jurisdictional amount in controversy requirement for bringing an action in the state superior court, and McGinnis has provided no evidence that she has suffered monetary damages as a result of the 1989 termination.

There is no evidence to support McGinnis' claim that Patterson breached his contract or was negligent with respect to the reinstatement once it was ordered by the superior court. Nor is there evidence that McGinnis is entitled to monetary tort and contract damages which Patterson failed to obtain. However, it remains a disputed question of material fact whether Patterson breached his

duties owed McGinnis when he temporarily ceased pursuit of the case, causing McGinnis to suffer monetary damages in the amount she paid to retain Hemenway. Claims seven and eight thus remain but are limited to the question presented above.

3. Conspiracy between ASD, AEA and Patterson (Claim Thirteen)

Patterson argues that there is no evidence of a conspiracy between him, ASD and AEA. McGinnis suggests that a jury could reasonably infer that after she moved to California to start a new profession, ASD, AEA, Patterson and Croft conspired to avoid further animosity among their peer group to avoid reemploying a dedicated teacher who had upset high level school administrators by exposing misconduct of ASD personnel through grievance process, and to avoid future difficulties. Patterson's roll in this conspiracy would have been to withdraw effective assistance of counsel and to stop pursuing McGinnis' case, possibly in exchange for money. Because there is no evidence to support this theory, claim thirteen must be dismissed.

4. Infliction of Emotional Distress (Claim Fifteen)

Patterson argues that there is no evidence to support the claim for emotional distress. The court agrees. Claim fifteen is dismissed with respect to Patterson.

E. ASD's Summary Judgment Motion

1. Statute of Limitations (Claims One, Two, Three, Five, Six, and Fifteen)

ASD argues that the statute of limitations bars-claims one, two, three, five, six and fifteen because, with the exception of the August 31, 1992 termination letter, all actions giving rise to those claims occurred long before two years preceding August 25, 1994, the date the complaint was filed. McGinnis argues that she did not discover the injury until she was officially terminated, which would have been 15 days after the termination letter.

Most of McGinnis' claims are not barred by the statute of limitations because, under the facts alleged in the complaint, she did not discover the alleged discrimination or misrepresentations of fact until August 25, 1992, when she arrived at the school to find no written contract. Claim one, which alleges employment discrimination, is partially based on the alleged denial of access to employment in 1992. Therefore, claim one remains. Claim two, which alleges discharge in violation of public policy, is based partially on the alleged false representation ASD made to McGinnis that she could continue employment, followed by the denial of access to employment and the ensuing "retermination." Claim two thus remains. Claim three alleges misrepresentation of fact to induce relocation for employment purposes and is based partially on the failure to confirm employment by providing McGinnis a written contract. Viewing the facts as alleged, McGinnis could not have known she was injured by any misrepresentations until her employment was terminated. Thus, claim three remains. Similarly, claim six,

which alleges intentional misrepresentation of fact, and claim fifteen, which alleges infliction of emotional distress, appear to include the 1992 termination and, thus, must remain.[2]

Only claim five for conversion is barred by the statute of limitations. McGinnis clearly knew or should have known long before August 25, 1992, that ASD owed her money for teaching services performed before the initial termination in 1989. Claim five is dismissed.

2. Exhaustion of Administrative Remedies (Claims Two, Four & Thirteen)

ASD argues that claims two, four and thirteen are barred by McGinnis' failure to exhaust administrative remedies. McGinnis argues that there was no administrative remedy, because she was never actually reinstated and, thus, was never terminated.

> A tenured teacher's due process rights prior to dismissal are set forth in AS 14.20.180. The Board must notify the teacher of the dismissal and provide "a statement of cause and a complete bill of particulars." The teacher may then request a public or private hearing and other rights, such as representation by counsel and

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[2] In footnote two of its memorandum at docket 85, ASD joins in and supports AEA's summary judgment motion "to the extent that any claim, issue or ruling has any applicability to the claims against Anchorage School District, such as the sixth, thirteenth and fifteenth causes of action. However, ASD does not provide the court with sufficient information or argument to ascertain whether and how the court's rulings with respect to AEA apply to ASD.

> cross-examination, are granted during the hearing. This hearing is to be held prior to an effective dismissal. A pre-termination hearing is consistent with due process and AS 14.20.180.

Kenai Peninsula Borough Bd. of Educ. v. Brown, 691 P.2d 1034, 1036-37 (Alaska 1984) (footnote omitted). The tenured teacher may, within 15 days immediately following receipt of the notification [of dismissal or nonretention], notify the employer in writing that a hearing before the school board is requested." AS 14.20.180(b). "Thus, the termination is not effective until at least fifteen days following the notification of dismissal. If the teacher does not request a hearing, the dismissal becomes effective immediately following the expiration of the fifteen day period." *Brown*, 691 P.2d at 1037.

"[W]hen grievance procedures are available, an employee must exhaust contractual or administrative remedies before pursuing a direct judicial action against the employer." *Pederson-Szafran v. Baily*, 837 P.2d 124, 128 (Alaska 1992) (citing *Casey v. City of Fairbanks*, 670 P.2d 1133, 1136 (Alaska 1983); *Beard v. Baum*, 796 P.2d 1344, 1348 (Alaska 1990)). "The requirement that an aggrieved employee exhaust administrative remedies is inapplicable, however, 'where the administrative remedy is inadequate or where the pursuit of the administrative remedy would be futile due to the certainty of an adverse decision.' " *Romulus v. Anchorage Sch. Dist.*, 910 P.2d 610, 615 (Alaska 1996) (quoting *Eidelson v. Archer*, 645 P.2d 171, 181 (Alaska 1982)).

During her deposition, McGinnis was asked if, after learning she had been terminated on August 31, 1992, she took any steps to request a hearing under Alaska law as a

tenured teacher. She responded that she did not, because she believed it would be futile in light of ASD's past conduct. However, there is no evidence to support this statement. *See Romulus*, 910 P.2d at 615 ("A grievance process appears futile when the person who ordered the adverse employment decision presides over its appeal"). McGinnis offers no evidence to support her argument that she never was reinstated. In fact, the complaint specifically alleges that ASD terminated her tenured employment. By this, she cannot be referring to the 1989 termination, because the statute of limitations clearly had run with respect to it. Thus, the second, fourth and thirteenth causes of action must be dismissed for failure to exhaust administrative remedies.

3. Conspiracy between ASD and Croft (Claim Fourteen)

Claim fourteen alleges that Croft entered into a secret promise that Croft would not pursue further action against ASD on behalf of McGinnis, depriving her of reimbursement for medical expenses and interest. The complaint states that ASD and Croft "conspired with each other to commit the tortious conduct as alleged and by reason of the conspiracy and concerted efforts by these Defendants and each of them inflicted severe emotional distress upon Plaintiff and deprived Plaintiff of reimbursement for medical expenses and interest and penalty as provided by law". (Docket 1, pg. 27). ASD argues that the court should dismiss the claim because the Alaska Workers' Compensation Act precludes her from asserting common law tort claims for damages.

AS 23.30.045 contains the provisions regarding the employer's liability for workers' compensation. "The liability of an employer prescribed in AS 23.30.045 is exclusive and in place of all other liability of the employer . . . " AS 23.30.055. "However, if an employer fails to secure payment of compensation as required by this chapter, an injured employee or the employee's legal representative in case death results from the injury may elect to claim compensation under this chapter, or to maintain an action against the employer at law or in admiralty for damages on account of the injury or death." *Id.* Furthermore, "[a]n exception to the exclusivity provisions of AS 23.30.055 exists in cases of an employer's, or fellow employee's, intentional tort committed against the employee." *Williams v. Mammoth of Alaska, Inc.*, 890 P.2d 581, 185 (Alaska 1995) (citing *Van Biene v. ERA Helicopters, Inc.*, 779 P.2d 315, 318 (Alaska 1989)).

McGinnis seeks redress against ASD for an alleged conspiracy to deny her benefits to which she was entitled. ASD does not challenge the existence of evidence to support claim fourteen, only McGinnis' right to pursue the claim. Because the alleged civil conspiracy to deny benefits is an intentional tort, claim fourteen remains.[3]

4. Emotional Distress (Claim Fifteen)

The fifteenth cause of action alleges negligent or intentional infliction of emotional distress. ASD argues

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[3] The court is *not* making a finding that there is evidence to support this claim. As noted, ASD has not argued any lack of evidence.

that McGinnis cannot recover for negligent infliction of emotional distress, because her employment contract was not the type of contract which would establish a sufficient preexisting duty, nor was it "highly personal and laden with emotion," and because she offers no facts which would establish that she suffered severe or serious emotional distress. *Chizmar,* 896 P.2d at 203. With respect to the claim of intentional infliction of emotional distress, ASD argues that McGinnis has failed to offer evidence that ASD's conduct was extreme and outrageous, intentional or reckless, and that the distress was severe. *Id.* 896 P.2d at 208. McGinnis argues that the extent of the injuries is for the jury to decide. Her affidavit states that she has "continuing illness including headaches, stomach disorders, problems sleeping, and anxiety and depression which are directly related to acts and omissions of ASD and the other Defendants." (Docket 128; McGinnis affidavit). McGinnis argues that ASD's response to the judgment against it ordering her full reinstatement was to escalate its behavior by substantively ignoring the court's order, tricking her into relocating to Alaska from California on its false promise of employment, and engaging in a cover-up attempt.

The court agrees that the present state of the evidence leaves a disputed issue of material fact concerning the extent of the alleged injuries. They may be serious enough to support McGinnis' claims. However, the employment contract does not embody the close relationship required to create a duty whose negligent violation could give rise to a claim for emotional distress. With one exception, taking the evidence in the light most favorable

to McGinnis, ASD's alleged conduct cannot be characterized as adequate to support a claim for intentional infliction of emotional distress. The one exception is the claim that ASD agreed with Croft to deny McGinnis' benefits. Consequently, claim fifteen is dismissed with respect to ASD, except for the claim that ASD intentionally deprived McGinnis of benefits.

F. Motions at Dockets 147 and 153

At Docket 147 defendant Croft has moved to dismiss plaintiff's complaint against him for failure to prosecute and in the alternative to compel discovery. At docket 153 plaintiff has moved to strike Croft's motion to dismiss and Croft's request for discovery as untimely under the existing planning and scheduling order. McGinnis is correct. The motion is untimely and good cause for filing late has not been established. The motion at Docket 147 is hereby stricken and the motion at Docket 153 is granted.

In view of the fact that the court is reopening discovery and motion practice for a limited period for reasons discussed below, it needs to be said that with respect to the request to dismiss for failure to prosecute at Docket 147, the court's examination of the motion showed that it is without merit. As to the request to compel discovery also contained in the motion at Docket 147, the court's examination of the motion reveals that the request probably has merit (although, of course, McGinnis had no opportunity to oppose the motion, nor the court to consider her opposition). For these reasons, while the reopening of motion practice allows for the filing of a motion seeking the same relief as that sought at Docket

147, Croft may want to rethink the wisdom of filing a motion to dismiss for failure to prosecute. Similarly, McGinnis might be wise to promptly negotiate a stipulation with Croft providing for the necessary discovery, before that issue has to be fully briefed and decided by the court.

G. Application at Docket 174

The application by Steven C. Finley to appear as counsel for plaintiff in substitution for Judith Oakes and without association of local counsel has been opposed. After due consideration, the court concludes that the application should be granted subject to the following conditions: First, Mr. Finley shall confer with Ms. Oakes and then advise the court in a status report to be filed not later than August 1, 1996, what steps Ms. Oakes took to associate local counsel and what steps Mr. Finley has taken to do so up to the date the status report is filed. Second, Mr. Finley shall either cause associated local counsel to file an entry of appearance or file a second status report not later than September 2, 1996, showing good cause why he has been unable to associate local counsel.

H. Amendment to Planning and Scheduling Order

At Docket 145, McGinnis moved to reopen discovery and to provide for additional motion practice. The court denied that request without prejudice (see Docket 149), finding it appropriate to await the disposition of several substantive motions. Those motions have now been decided, and the court finds it appropriate to reopen

discovery and to provide for additional motion practice. This is so, because this order has the effect of substantially reducing the scope of the litigation and refocusing attention on a few claims, rather than the host originally pled. The court has concluded that the parties' earlier attention to the numerous meritless claims overshadowed the claims which remain. The planning and scheduling order is revised as follows:

> (1) Each party as to which there are any remaining claims shall file a final revised witness list not later than August 16, 1996. Only those persons so disclosed shall be permitted to testify at any trial in this matter;
>
> (2) Discovery as to the remaining claims shall be conducted so as to be completed not later than October 18, 1996;
>
> (3) Discovery motions shall be filed not later than November 8, 1996;
>
> (4) Dispositive motions and motions in limine shall be filed not later than December 20, 1996.

The above dates will not be extended except upon motion made and for good cause shown. (The provision for extension by stipulation in the original planning and scheduling order does not apply).

IV. CONCLUSION

For the reasons set out above, the motion at Docket 80 is **GRANTED**. The motion at Docket 85 is **GRANTED** in part and **DENIED** in part as follows: As to ASD, claims two, four, five and thirteen are dismissed. Claims one, three, six and fifteen remain. However, claim fifteen is

limited to the alleged intentional infliction of emotional distress by the denial of benefits. The motion at Docket 104 is **GRANTED** in part and **DENIED** in part as follows: As to Patterson, claims six, thirteen and fifteen are dismissed. Claims seven and eight remain but are limited to the issue of whether Patterson failed to diligently pursue McGinnis' claim and damages are limited to expenses incurred in obtaining counsel to investigate and confront Patterson regarding this alleged failure.

The motions at Dockets 121 and 127 are **DENIED,** and the motion at Docket 139 is **DENIED** as moot. The motion at Docket 147 is **STRICKEN** and the motion at Docket 153 is **GRANTED.** The application at Docket 174 is **GRANTED,** but subject to the conditions discussed above. The planning and scheduling order is **AMENDED** as set out above.

DATED this 3rd day of July 1996 at Anchorage, Alaska.

/s/ John W. Sedwick
JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

A94-0385-CV (JWS)

J. JOSEPHSON
L. CROFT
B. OWENS (JERMAIN)

C. STOWERS
J. OAKES
S. FINLEY

APPENDIX T

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

SHERRY L. McGINNIS, Plaintiff, vs. ANCHORAGE SCHOOL DISTRICT, ANCHORAGE EDUCATION ASSOCIATION, and CHANCEY CROFT and JOHN PATTERSON, as individuals Defendants.	Case No. A94-385 CIV (JWS)

STIPULATION TO DISMISS REMAINING CLAIMS AGAINST JOHN PATTERSON

Plaintiff Sherry McGinnis, by and through her attorneys, Finley & Deaton, and Defendant John Patterson, by and through his attorneys, Clapp, Peterson & Stowers, stipulate to the dismissal with prejudice of the remaining claims against John Patterson, pursuant to the following terms:

1. By Order file dated July 5, 1996, at docket 177, the Court granted partial summary judgment in favor of John Patterson as to all claims asserted against him by Sherry McGinnis, with the exception of the following "remaining claims" that are the subject of this stipulation:

> [I]t remains a disputed question of material fact whether Patterson breached his duties owed McGinnis when he temporarily ceased pursuit of the case, causing McGinnis to suffer monetary damages in the amount she paid to retain Hemenway. **Claims seven and eight thus remain but are limited to the question presented above.** (Emphasis added.)

2. McGinnis and Patterson stipulate that McGinnis paid $345 to attorney Hemenway for his services in connection with McGinnis's action against the Anchorage School District, and that this amount is the most that McGinnis would be entitled to receive if a jury were to find in favor of McGinnis under the remaining claims as set forth in the Court's Order dated July 5, 1996, as quoted above.

3. Without admitting any liability whatsoever under the remaining claims, and expressly denying any liability, but in the interest of resolving the remaining claims without further expense or effort, Patterson agrees to pay McGinnis $345 in full and final satisfaction of the remaining claims.

4. McGinnis agrees to accept $345 in full and final satisfaction of the remaining claims against Patterson as set forth in the Court's Order dated July 5, 1996, and agrees that she is forever barred from relitigating these remaining claims should any of her other claims that

were dismissed by summary judgment by Order dated July 5, 1996 be reversed on appeal and remanded for trial.

5. McGinnis and Patterson agree that the stipulation to dismiss the remaining claims shall in no way prejudice McGinnis's right to appeal the Court's granting of summary judgment in favor of Patterson by Order dated July 5, 1996, and, in the event of reversal, shall in no way prejudice or prevent McGinnis from introducing admissible evidence as to the facts underlying the remaining claims.

6. McGinnis and Patterson agree that the stipulation to dismiss the remaining claims shall in no way prejudice Patterson's right to move for and obtain an award of costs and attorney's fees from McGinnis for having prevailed on the claims that were dismissed by summary judgment under the Court's Order dated July 5, 1996.

7. McGinnis and Patterson stipulate that in exchange of payment of $345 by Patterson, the remaining claims as articulated by the Court in its Order dated July 5, 1996, shall be dismissed with prejudice, each party to bear its own costs and attorney's fees with respect to the remaining claims only.

Finley & Deaton
Attorneys for Sherry L. McGinnis

6/17/97
Date

By: /s/ Steven Finley
Steven C. Finley, Esq.

CLAPP, PETERSON & STOWERS
Attorneys for John Patterson

June 17 '97
Date

By: /s/ Craig F. Stowers
Craig F. Stowers, Esq.

NON-OBJECTION OF CHANCY CROFT

I have no objection to this stipulation.

6/23/97 — By: /s/ Chancy Croft
Date — Chancy Croft, Esq.

ORDER

In accordance with the stipulation of the parties as set forth above, the Court orders that Plaintiff Sherry McGinnis' remaining claims as articulated by the Court in the Order dated July 5, 1996, are dismissed with prejudice, each party to bear its own costs and attorney's fees with respect to the remaining claims only.

DATED this ___ day of _____, 1997.

By: /s/ _____
John W. Sedwick
United States District
Court Judge

Certificate of Service:

I hereby certify that a copy of this document was mailed X faxed _ hand delivered _ on ~~May~~ June 25, 1997, to the following:

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